



**GHENT UNIVERSITY**

FACULTY OF LAW

INSTITUTE FOR PRIVATE INTERNATIONAL LAW

**by**

**Dalia Perkumienė**

**THE INSTITUTION OF MARRIAGE IN THE CANON AND LITHUANIAN CIVIL  
LAW WITH REGARD TO THE INTERNATIONAL RELATIONS**

Promotor: Prof. dr. Johan Erauw

A dissertation submitted for the degree of Doctor of Law at the University of Ghent

2014



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## **ABBREVIATIONS**

**CIC** - Codex Iuris Canonici (Canon Code)

**CCEO** - Codex Canonum Ecclesiarum Orientalium (Canon Code of East Churches)

**CC** – Civil Code

**CCP**– Code of Civil Procedure

**CEE** – Central and Eastern Europe

**Can.** – Canon

**CR**– Civil Registry

**EV** - Enciclika Evangelium vitae

**FA**– Family Act

**FC** – Familiaris Consortio

**GS** – Gaudium et spes (encyclical)

**GDL** – The Grand Duchy of Lithuania

**LR** – Lithuanian Republic

**MFL** – Muslim family law

**SSRL** – Soviet Socialist Republic of Lithuania

**OCM** – Ordo celebrandi matrimonium (provisions of marriage observance)

**PIL**– International Private Law

**SFSRR** – Soviet Federal Socialist Republic of Russia

**CFS** – The Congregation of Faith Science

**USSR** – The Union of Soviet Socialist Republics

**MFC** – Marriage and Family Code

## INTRODUCTION

With regard to societal relationships, the family plays a very important role. It is a fundamental relationship which carries out functions of critical importance. These functions include the following: providing childbirth and education of the young generation, and the provision of mutual material and moral support. Under the Lithuanian Civil Code Article 3.7 § 1<sup>1</sup> marriage is the union between a male and a female. Marriage is not simply a private or secret matter, but the subject of concern of the broader society, the State, and the religion. Most states agree on the role of organized religions in the regulation of the institution of marriage. This leads to potential differences and conflicts in the secular and religious interpretations and regulations on marriage in the areas of the status of engaged couples, including such aspects as valid conclusion of marriage and its consequences, plus dissolution through divorce or by death.

**The aim of the research** is to analyze the institution of marriage in the context of civil and Catholic Church laws.

**The subject of the research** is marriage as an institution under of Civil and canon law of the Catholic Church.

This thesis aims to achieve the following scientific **goals**:

1. To define and explain marriage and related family institutions and concepts in the context of social science;
2. To introduce the development stages of the marriage institution in the historical approach;
3. To analyze and define the common features, peculiarities and requirements of the church and civil marriage conclusion, registration and recognition;
4. To analyze the possible outcomes of a matrimony life regarding personal and property relations of the future spouses under both civil and church law;
5. To describe the resolution of the conflicts under the rules governing the conclusion, the consequences, annulment and the dissolution of marriage in canon law and in civil law;
6. To research the international relations of the open society within Europe particularly with regard to foreign religious marriages and their dissolution;

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<sup>1</sup> Marriage is a voluntary agreement between a man and a woman to create legal family relations executed in the procedure provided for by law.



7. To investigate the constitutional recognition of the church marriage under the Lithuanian law (in the scope of domestic and international relations).

### **The scope of the topic**

This dissertation explores the marriage laws of the Republic of Lithuania in relation to the Canon law of the Roman Catholic Church. The Constitution, the Civil Code, and international agreements all regulate civil marriage in Lithuania. But the Church has its own laws (canon laws) regulating marriage, which are recognized by the civil authority. For instance, the Republic of Lithuania recognizes marriages performed in accordance with Church regulations by Church officials (priests). This dissertation researches the interaction of these disparate sets of rules. In doing so, the dissertation seeks to describe how, and to what extent, the result of the interplay between state and church law corresponds to the hopes and interests of the persons involved (both the spouses and their families).

The aim of the thesis allows formulate at the outset the following **hypothesis**:

Attitude to the marriage institution in the Republic of Lithuania is mainly a social phenomena and has currently undergone significant transformation considering continuously changing social environment (living conditions, individual needs and abilities). The Church, however, maintains its traditional view of the marriage institution, based on philosophical and theological generalizations. This imposes a potential conflict between these differing conceptions. Furthermore, as the Lithuanian society has become open to visitors from abroad and to a mix of personal laws that are considered when we look at marriage and its dissolution, a number of important developments occur. The entry of Lithuania into the European Union and notably its confrontation with the developments around the mutual recognition of a formal act and of court decisions from the member states obliges the legal scholars to open up the debate around marriage and divorce when they occur abroad in another legal order be it that of another EU Member-State or that of a non-EU “third” country”.

### **Scientific problem**

The Church and the State are two sovereign subjects, which recognize each other. They both regulate several aspects of human society. Marriage is one of the main subjects of consideration to the Church and to the State too, it is a major institution of civil law. According to Canon law, marriage is a life-long obligation. However, state laws qualify

marriage as an agreement without a term. It means that for the state marriage can be everlasting, but it also accepts that this agreement can be terminated at any point in time by following a prescribed procedure. According to the church law, marriage is a sacrament. A close relationship exists between the State and church laws for the requirements of marriage but their position in understanding the moral and spiritual values of future spouses is quite different. The relationship between church and state marriage law is often in conflict, as church law does not recognize civil law marriages and the State does not automatically give full effect to a religious marriage under civil law. Conflicts arise and as to expectations do not satisfy the needs of future spouses. When we stretch out the scope of the research, we see, that similarly, the reception of foreign church marriages causes conflicts and divorces. The effects of foreign civil and religious marriages must be understood well. The divorces from abroad are just as important as the issue of original validity—when one asks about the effects of marriages in the international context.

The Lithuanian Republic Marriage and Family Code, which was in force from 1971 until 1st July, 2001, approved only of those marriages that were registered in the State Civil Register. Under the temporary rules of the civil status registration in Lithuania, the marriage validity conducted under the church law after 2 November, 1992 (under the new Lithuanian Constitution) could be registered, if the couple desired, in the Lithuanian Civil Registry. In this case, it was entered into the Civil Register and a marriage certificate was issued, and the marital status was noted on the spouses' passports. According to these rules, the date of marriage was also stated on the church marriage certificate. For example, if the couple married in 1994, and entered their marriage into the civil registry in 2000, the marriage date would be recorded as 1994. The current Lithuanian Civil Code specifies that a church marriage must be reregistered into the civil registry within ten days<sup>2</sup>. Article 38 of the LR Constitution states: "The State recognizes the registration of church marriages"<sup>3</sup>. If a particular marriage was concluded before such a constitutional right was given, then the question arises, whether the State can limit the recognition and its registration of such a church marriage to the period of ten days following the church celebration?

The Lithuanian Civil Code provides recognition<sup>4</sup> of church marriages. Some

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<sup>2</sup> Lithuanian Civil Code. Vilnius: Lithuanian Republic Ministry of Justice, 2001. Art. 3.304.

<sup>3</sup> The Lithuanian Republic Constitution, accepted in the Referendum on 25<sup>th</sup> October, 1992 // State news. 1992. Nr. 33 – 1014, Art. 38.

<sup>4</sup> An acknowledgement of the existence, validity and legality of marriage.

requirements for a civil marriage are similar to those under the church law. However, according to the Civil Code, after the formal registration of the church marriage, the conditions of the further recognition of this marriage under the civil law are not clear. The state marriage registration laws obviously cause problems in the church marriage practice.

So in what follows I will ask the question, whether Lithuanian civil laws acknowledge the legality of the church marriage which is guaranteed by the Constitution.

I have chosen to add an international dimension to my research. A country like Lithuania is open to the outside world. The population is mobile; there has been a remarkable increase of Lithuanian citizens that have moved out of the country for a short or for longer periods of time. At the same time Lithuania has evolved towards receiving increased numbers of persons from foreign countries. Those who travel outward as well as those who have immigrated bring with them aspects of their personal files and of their legal past that is connected to other systems or sets of national rules. We are presently constantly confronted with trans-frontier or “international” personal relationships either in connection with member states of the European Union or with countries not part of EU. National rules and practice for marriage differ from one country to another – even from one EU Member-State to another, mainly as regards: rights and obligations of married couples – for instance concerning their property, their role as parents or their marital name; relationship between religious and civil marriage – some countries recognize religious marriage (see e. g. footnote 6) as equivalent to civil marriage, others do not. If couple moves to another country after having entered into a religious marriage only, it is important to check the consequences for marital status; also there can be different requirements for marriage – the most notable difference is the right of same-sex couples to get married. As of today, the following EU countries grant this right: Belgium, Denmark, France, the Netherlands, Portugal, Spain Sweden and the United Kingdom.

If a person is getting married in a different EU country from the one where he or she lives, this person should check with the authorities in both countries which formalities are needed for his or her marriage to have full force and effect in both countries. These may include registration or publication requirements. The EU has not unified or harmonized the law of the valid conclusion of marriages; for legal elements in that regard, we are forced to look beyond EU law at rules of private international law about recognition of marriage. When it comes however to the dissolution of marriages through divorce. Each

EU Member-State has its own rules about annulment of marriage, separation and divorce.

I of course have chosen to look at the special juxtaposition or tension between state marriages and religious marriages, so also the international cases will focus on issues in that particular field. The role of the EU is mainly concerned with ensuring that decisions made in one country can be implemented in another. It also has a role in trying to establish which country has jurisdiction to hear a particular case. There is indeed a Regulation covering the jurisdiction and then also the mutual recognition of divorce decisions. This would affect those marriages or legal relations like marriage when they are concluded before religious authorities but receive the legal sanction of the state as “marriage” in the definition of the European acts. I will be demonstrating the effects of this on the law and the practice of Lithuania.

Next, this thesis also wishes to contribute to a good understanding of Lithuanian private international law for cases related to dissolution of marriages in relation to countries outside the EU – so that broader perspective will also be given further down.

#### Methods of the research

With a view to the research question proposed above and the possible validity of certain presumptions that I have put forward, I will use methods of analysis of academic literature, also a doctrinal historical, systematic and comparative analysis methods.

The use of logical and systematic legal analysis and the comparative method are the key study methods in my thesis. The intention is not only to analyze the fundamental statutes, laws, judicial applications and scholarly opinions but also to identify and interpret the philosophical, traditional and theological aspects that societies associate with marriage and family.

The historical and comparative methods allow us to investigate the origin of the marriage institution and the meaning of the legal norms involved, whereas each norm of law is historically predetermined and only can be understood by analyzing history”<sup>5</sup>.

In the framework of the twofold approach, I have chosen several countries<sup>6</sup> for comparison purposes where both ceremonies of marriage - civil and religious<sup>7</sup> - can be legally held. That will enable me to analyze and compare both ceremonies of marriage -

<sup>5</sup> VAIŠVILA, A., *Theory of Law: Textbook*, Vilnius: Justitia, 2000, p. 16.

<sup>6</sup> European Union countries (in seventeen EU countries church marriage is recognized by State: in Lithuania, in Latvia, in Estonia, in Spain, in Italy, in Cyprus, in Greece, in Denmark, in Sweden, in Poland, in the United Kingdom, in Ireland, in Portugal, in Malta, in Finland, in Slovakia, in Czech Republic).

<sup>7</sup> Canon law of the Catholic Church.

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civil and ecclesiastical one - which can be concluded under the law and have legal consequences.

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Actually, all religions share a similar approach to the marriage institute<sup>8</sup>, that is a long-term union between two people established with ceremonies and rituals. Many religions have extensive teachings regarding marriage. Christians, first of all, see matrimony as an embodiment of the relationship between Jesus Christ and His Church. In Judaism, marriage is so important that remaining unmarried is deemed unnatural. Islam also recommends marriage highly; among other things, it proclaims marriage as a background in the pursuit of spiritual perfection. In order to reveal similarities and differences of the attitude to the marriage institution, some legal aspects of the institution of marriage under the Islamic and Jewish law were introduced. The differences between the conceptual model and the subject of comparison at the international level determine the boundaries of the analogy.

**Practical impact of this work of analysis may be expected.**

The problems analyzed in the dissertation are of legal and practical importance. Lithuanian law can be best understood in its sections on the domestic law and the private international law; it could eventually be modified and potentially improved only after having clarified the relation between the religious and civil marriage institutions.

The paper analyzes national and international practical problems and conflict situations, the solution of which may be important for the courts decisions when addressing the issues of civil and church marriage interactions. Dissertation proposals and theoretical approaches may be useful as for legislators when making decision on ecclesiastical and civil marriage recognition, as well as for the practitioners of law.

The practical importance of this thesis also lies in the fact that the problem of the recognition of the church marriage is relevant in seventeen countries of the European Union who recognize a valid registration of the church marriage. As procedures of the church marriage recognition vary from country to country in the European Union, this thesis could eventually or hopefully be of service to set up a regulation in regard to the church marriage recognition and unification of registration.

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<sup>8</sup> Under Lithuanian Republic statute of religious communities and associations the legislation of the Lithuanian Republic recognizes the marriages concluded by state-recognized religious associations and communities: Roman Catholics of the Latin Rite, Roman Catholics of the Greek Rite, Evangelical Lutheran, Evangelical Reformist, Evangelical Baptist (Lithuanian Baptist Union), Orthodox, Old Believers (Starovery), Jewish, Muslim, Sunni and Karaite, Seventh-day Adventist.

**Structure of the work:**

The dissertation consists of an introduction, the main part (embracing four chapters), conclusions, recommendations, bibliography, and appendices.

In the first part of my thesis, to answer the above questions, I present a description of the concept of the marriage institution in the context of social sciences and I describe in detail the historical background of the Civil and Catholic Church marriages.

The second part incorporates the opposing attitudes of the Church and the Republic of Lithuania authorities on attitudes with regard to marriage, the rights and obligations of engaged couples. In this part I also present the engagement institution in comparative conflict of laws.

In the third part of my scientific work, I go deeper into the Canon and Civil law requirements regarding the legitimate conclusion of marriage, as well as into the inter-relations between the Lithuanian Civil law and Canon law in respect of the conflict among different regulations.

The fourth part presents the issues of international recognition of the civil and ecclesiastical marriage institution. This 4<sup>th</sup> part deals with the international aspects of the thesis, more specifically with the issue of validity and recognition of marriage and its dissolution.

The final stage of the dissertation consists of general conclusions based on the analysis presented with recommendations for alleviating the problems that were highlighted.

## **PART I**

### **THE CONCEPT OF FAMILY AND MARRIAGE AND THEIR SOCIAL MEANING**

## ***Chapter 1***

### ***Family and marriage in the context of sociology***

#### **I. THE MEANING OF FAMILY AND MARRIAGE FROM THE HISTORICAL PERSPECTIVE**

The meaning of marriage and family differs from one person to another, and from one time to another. In ancient times, for example, a marriage meant a condition in which a woman was given to a man almost as property, and often as part of a political, social, or business arrangement of some sort<sup>9</sup>. For much of human history, marriage was a permanent institution that, once entered into, cannot be dissolved except by the death of one of the spouses. In the modern world, however, marriage is a vastly different thing. On the up side, marriage is today more of a union of equals, rather than the subjugation of one person to the other. On the down side, marriage often becomes much more temporary than it has been in years past<sup>10</sup>.

The term *family* comes from the Latin. But the ancient Romans did not use *familia* to mean blood filiations or kinship. It meant rather the household property – the fields, house, money, and slaves<sup>11</sup>.

The ancient Greeks used the word *oikos*, which is translated “family”. Aristotle said that the family (*oikos*) was composed of three elements: the male, the female, and the servant<sup>12</sup>.

In Arabia at the time of Mohammed, the word for marriage was *Nikan*, which literally meant sexual intercourse. In the Koran it was also used to mean a contract. Marriage thus was conceived of as a contract for sexual intercourse<sup>13</sup>.

The meaning of the word “family” can be a matter for elaborate sociological and anthropological discussion. Traditionally, marriage was an essential prerequisite for the

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<sup>9</sup> COLLINS, R. and COLTRANE, S., *Sociology of Marriage and Family: Sex, Love and Property*, Chicago: Nelson-Hall, 1991, p. 68.

<sup>10</sup> STOCKARD, J., *Marriage in Culture: Practice and Meaning across Diverse Societies*, Orlando: Harcourt College Publishers, 2002, pp. 8-10.

<sup>11</sup> COLLINS, *supra* note 9, p. 70.

<sup>12</sup> *Id.*

<sup>13</sup> FUSTEL DE COULANGES, J. and NUMA, D., *The Ancient City*, Baltimore: Johns Hopkins University Press, 1973, pp. 89-90.



creation of a legally recognised family unit<sup>14</sup>.

Family is one of the oldest public institutions, in which priests, medics and lawyers have showed an interest throughout the history. However in the earliest historical signs of humans one can find psychological attempts to affect a family's prosperity and compatibility<sup>15</sup>.

Family relations are examined also from the viewpoint of sociology, ethics, demography, and of other subjects of research. To research family relations we should distinguish between family as a social institution and family as a small domestic group. On the one hand, to describe family as a social institution, family is viewed as a system performing particular social functions and as being a part of a larger system (society). On the other hand, the behaviour of a human being is governed not only by social institutions but by individual features, social status and ethnic groups<sup>16</sup>.

## II. THE DESCRIPTIONS AND DEFINITIONS OF MARRIAGE AND FAMILY

“Marriage [is like]... an archaeological site on which the present is constantly building over the past, letting history's many layers twist and tilt into today's walls and floors... many people believe their marriage is the one true claim to this holy ground. But ... marriage has always been a battleground, owned and defined by different groups. While marriage may retain its ancient name, very little else has remained the same, its boundaries, boulevards, or daily habits have changed, the only part remaining the same is its inhabitation by human beings. And yet, marriage has outlasted its many critics and has also outlasted the doomsayers of so many eras who post marriage' obituary notice every time society talks about changing its marriage rules”<sup>17</sup>.

Marriage is socially sanctioned union that reproduces the family. In all societies the choice of partners is generally guided by rules of exogamy (the obligation to marry outside a group); some societies also have rules of endogamy (the obligation to marry

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<sup>14</sup> CRETNEY, S. and MASSON, J., *Principles of Family Law*, London: Sweet & Maxwell, 2003, p. 5.

<sup>15</sup> NAVAITIS, G., *Psichologinis Šeimos Konsultavimas*, Vilnius: Tyto Alba, 2001, p. 7. [NAVAITIS, G., *Psychological Consultation of Family*, Vilnius: Tyto Alba, 2001].

<sup>16</sup> NAVAITIS, G., *Psichologinė Parama Šeimai*, Šiauliai: Šiaulių Pedagoginis Institutas, 1996, p. 5. [NAVAITIS, G., *Psychological Help for Family*, Šiauliai: Pedagogic Institute of Šiauliai, 1996].

<sup>17</sup> GRAFF, E., *What is Marriage For?* Boston: Beacon Press, 1999, p. 23.

within a group). These rules may be prescriptive or, as in the case of the incest taboo, proscriptive; they generally apply to kinship groups such as clan or lineage; residential groups; and social groups such as the ethnic group, caste, or class<sup>18</sup>.

Marriage is a relationship between individuals which has formed the foundation of the family for most societies. Marriage can include legal, social, and religious elements<sup>19</sup>.

In most western societies, marriage has traditionally been understood as a social contract between a man (husband) and a woman (wife), while in some western societies today, same-sex marriage is recognized. Ten European countries legally recognize same-sex marriage, namely Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom<sup>20</sup>.

Marriage is a socially recognized and an approved union between individuals, who commit to one another with the expectation of a stable and lasting intimate relationship. It begins with a ceremony known as a wedding, which formally unites the marriage partners. A marital relationship usually involves some kind of contract, either written or specified by tradition, which defines the partners' rights and obligations to each other, to any children they may have, and to their relatives. In most contemporary industrialized societies, the government certifies marriage<sup>21</sup>.

However, marriage and family are also especially the place of loyalty and emotional links. Thus they are the place where it is possible to develop self-confidence, to get moral orientation and, at the same time, religious experience. The very first, basic experience with religion is also closely linked to family relationships. This is not at all about drawing an ideal picture of the family. But, this brief drawing may, at least, raise conscience about the heavy burden of life people have to carry when the family fails for long stretches of time or even totally<sup>22</sup>.

In the American "Dictionary of Sociology" family is defined as: "One or more men who live with one or more women and have intimate relationships in a socially

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<sup>18</sup> HENSLIN, J., *Marriage and Family in a Changing Society*, New York: Free Press, 1985, p. 17.

<sup>19</sup> LAMANNA, M., RIEDMANN, A. and STRAHM, A., *Marriages, Families, and Relationships: Making Choices in a Diverse Society*, Belmont: Wadsworth, 2012, pp. 3-4.

<sup>20</sup> The law does not apply to Northern Ireland and Scotland. In Scotland a separate law will come into force by late 2014.

<sup>21</sup> HENSLIN, *supra* note 18, p. 17.

<sup>22</sup> REIFELD, H., *Marriage, Family and Society – a Dialogue with the Islam*, Berlin: Konrad-Adenauer-Stiftung, 2006, p. 33.

organized order and live together with their posterity<sup>23</sup>”.

Traditionally marriage was an essential prerequisite for the creation of a legally recognized family unit. Only by marriage did a woman obtain the right to be supported by a man, only if his parents were married was a child recognized for the purpose of inheriting their property, and so on. There are now many exceptions to this principle, but the courts still tend to apply it in the absence of specific rules to the contrary<sup>24</sup>.

Marriage is a promise between two persons for the procreation and education of children; and it seems to have been instituted as necessary for the very existence of society; for without the distinction of families, there can be no encouragement to industry, or any foundation for the care of acquiring riches<sup>25</sup>.

Marriage can be defined as a socially acknowledged and approved sexual union between two adult individuals. When two people marry, they become kin to one another; the marriage bond also, however, connects together a wider range of kin. Parents, brothers, sisters and other blood relatives become relatives of the partner through marriage<sup>26</sup>.

Debates over the definition of marriage and family illustrate its dual nature as both a public institution and a private personal relationship. On the one hand, marriage involves an emotional and sexual relationship between particular human beings. On the other hand at the same time, marriage is an institution that transcends the particular individuals involved and unites two families<sup>27</sup>. In some cultures, marriage connects two families in a complicated set of property exchanges involving land, labour, and other resources. The extended family and society also share an interest in any children the couple may have<sup>28</sup>. Furthermore, the legal and religious definitions of marriage and the laws that surround it usually represent the symbolic expression of core cultural norms (informal behavioural guidelines) and values<sup>29</sup>.

As it always has, the meaning of marriage is changing as the times change. As society changes, the institution of marriage changes. These changes may or may not be a good thing; in the end, they are probably a little of both. The meaning of marriage, in the

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<sup>23</sup> BOUDON, R. and BOURRICAUD, F., *A Critical Dictionary of Sociology*, Chicago: University of Chicago Press, 1988, p. 65.

<sup>24</sup> NAVAITIS, *supra* note 15, p. 12.

<sup>25</sup> BACON, M., *Abridgement*, New York: MacMillan, 1932, p. 46.

<sup>26</sup> GIDDENS, A., *Sociology*, Cambridge: Polity Press, 1997, p. 140.

<sup>27</sup> OGIDI, K., *When your Home is on Fire*, New York: Xlibris Corp, 2012, p. 16.

<sup>28</sup> *Id.*, p. 11.

<sup>29</sup> STOCKARD, *supra* note 10, p. 9.

modern world, is in a bit of flux; when people do get married, they should make sure that they agree up front on what they mean by marriage.

### **III. THE MEANING OF MARRIAGE AND FAMILY FROM A SOCIAL PERSPECTIVE**

The meaning of marriage should be looked at from a social perspective as well. A marriage is the conduit by which children are born; a marriage provides both a mother and a father for the children. The family unit, the relationship between parents and child, are all based on the marriage relationship.

Family is our social care and hope. It is the background of upbringing, protecting and safeguarding the rights and interests of children based on intimacy, reliability and stability. Family is the background of stability, idiosyncrasy and succession of a nation based on morality, spirituality and culture<sup>30</sup>.

It is one the most intimate, constant, reliable and effective parts of a child's upbringing. Creation and preservation of national identity, linked with the development of moral, spiritual and cultural values. It is a guarantor of national stability, an important creator of peace and comfort<sup>31</sup>.

Books on society<sup>32</sup> provide many descriptions of family. It is difficult to point out the authorship of some definitions; for example, family could be defined as the main cell of a community, as a group of relatives living together and having common ground and corporate property intimately related and protecting and safeguarding each other.

Family can be defined as "married couple or other group of adult kinsfolk who cooperate economically and in the upbringing of children, and all or most of who share a common dwelling"<sup>33</sup>.

According to Anthony Giddens, a family is a group of persons directly linked by

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<sup>30</sup> BAJORIŪNAS, Z., *Šeimos Edukologija*, Vilnius: Mintis, 1997, p. 5. [BAJORIŪNAS, Z., *Educology of Family*, Vilnius: Mintis, 1997].

<sup>31</sup> *Id.*

<sup>32</sup> McKIE, L. and CUNNINGHAM-BURLEY, S., *Families in Society: Boundaries and Relationships*, Bristol: The Policy Press, 2005, pp. 8-12; SKOLNICK, A. and SKOLNICK, J., *Intimacy, Family, and Society*, Boston: Little, Brown, 1974, pp. 12-18.

<sup>33</sup> SKOLNICK, A. and SKOLNICK, J., *Family in Transition*, Boston: Scott, Foresman and Company, 1993, p. 23.

kin connections, the adult members of which assume responsibility of caring for children<sup>34</sup>.

Family relationships are always recognized within wider kinship groups. In virtually all societies we can identify what sociologists and anthropologists call the nuclear family, two adults living together in a household with their own or adopted children<sup>35</sup>.

The family is what sociologists call a primary group. It is a social institution which simply exists. Its structure is determined pre-legally. It has existed long before Law was invented as a special technique of social ordering<sup>36</sup>.

According to the Lithuanian psychologist G. Navaitis, family refers to a collection of people, related to each other, who have commitments to each other and have a unique identity with each other. These commitments cannot be fulfilled by other interaction of the community. The members in the collection have varying degrees of co-ordination of their different needs<sup>37</sup>.

The famous American family specialists Carpel and Strauss specify that family psychology can be guided by several different approaches of the family union. According to them, family can be defined by:

- Biological family - the union allowing an individual to continue biologically of oneself, to leave posterity;
- Juridical family - the union authorizing agreements of public institutions which determine the rights and duties of family members;
- Functional family - the union organizing the casual life of its members, communication, interaction, the regulation of daily living and leisure-pursuit;
- Long-terms social obligations - an agreement to ensure the socialization of children and the support of elderly people;
- The family is realized subjectively as the structure of relations, which peculiarities and meaning are interpreted individually by the members of the family<sup>38</sup>.

According to the Lithuanian psychologist Z. Bajoriūnas, the functions of family are childbirth, children's upbringing, the succession of ethos, economic cooperation,

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<sup>34</sup> GIDDENS, *supra* note 26, p. 140.

<sup>35</sup> *Id.*

<sup>36</sup> DAVID, R., *Persons and Family*. International Encyclopedia of Comparative Law. Volume IV, chapter 1, New York: Macmillan Publishing, 1994, p. 4.

<sup>37</sup> NAVAITIS, *supra* note 15, pp. 7-8.

<sup>38</sup> KARPEL, M. and STRAUSS, E., *Family Evolution*, New York: Gardner Press, 1983, pp. 29-35.

reproduction and recreation, communication, and guiding sexual activity<sup>39</sup>.

A family according to Matulienė reproduces and raises children, learns about the social skills and social roles, loves and cares for their children, gives advice or consults their children and gives the feeling of satisfaction and security<sup>40</sup>.

The psychological marriage band is created after the pair's intercourse and starts to influence the persons' feelings and mentality and remains as long as this intercourse and attitude are subjectively meaningful to them<sup>41</sup>.

In the psycho pedagogical sense family may be perceived as distinctive, complex and a conditionally closed social – psychological unit<sup>42</sup>.

The psychotherapists' views on family are also very important. The attitude of psychotherapists towards family differs in the psychological presumption of family conflicts and in solving such conflicts<sup>43</sup>.

According to psychology, one of the main motives for marriage is the creation of conditions for constant communication with the spouse, who can understand and support. However, the expectations of domesticity are often built, not on the familiarity of the future husband's personality, but on his features and communication attitude which might perhaps be unacceptable to marriage. Therefore some newlyweds quickly feel annoyed by marriage and break it<sup>44</sup>.

Family ideology is based on the expectation that every physically and mentally mature individual must marry and serve as a productive member of society. Moreover, there are broader expectations, because a family serves as a fundamental social group in society<sup>45</sup>.

It's not surprising that family is in the centre of attention for psychologists, pedagogues, family searchers, specialists and scientists of other branches. Family lies at the basis of society and State; the robustness and stability of society starts in a family. Family as an original subject of our culture takes the main role in educating the young generation and assuring the care and supervision of family members.

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<sup>39</sup> BAJORIŪNAS, *supra* note 30, p. 28.

<sup>40</sup> MATULIENĖ, G., *Šeimos Psichologija*, Kaunas: Technologija, 1997, p. 49. [MATULIENĖ, G., *Psychology of Family*, Kaunas: Technologija, 1997], pp. 50-51.

<sup>41</sup> NAVAITIS, *supra* note 15, p. 18.

<sup>42</sup> BAJORIŪNAS, *supra* note 30, p. 24.

<sup>43</sup> NAVAITIS, *supra* note 16, p. 8.

<sup>44</sup> L'ABATE, L., *Family Psychology: Theory, Therapy, and Training*, Washington: University Press of America, 1983, pp. 21-23.

<sup>45</sup> *Id*, p. 53.

Family relationships also reflect on the hierarchy of the roles played by family members. In the same views the main role of the family is played by the man, but the woman is also expected to play the equivalent role of feeder<sup>46</sup>.

Family life is not a one off act, but it is an ever-lasting process. It what often depends on the living conditions of the parents, on their intellect, education, culture and wills it is a product of their pedagogical wisdom, creativity and of their aspirations<sup>47</sup>.

Family is the place for its members where, for the first time, they are basically being integrated in human society. This is where children receive the elementary experience being accepted without which they can not live. The educational performance provided by the family lays the foundation for any further education of the person<sup>48</sup>. Therefore, the family is the first and fundamental institution for upbringing and education.

To sum up, almost all the definitions of family point out family is the fundamental building block for almost all societies sharing goals and values based on customs and traditions. Some family researchers point out family serves individuals to be productive members of society.

#### **IV. THE MEANING OF MARRIAGE AND FAMILY FROM A LEGAL PERSPECTIVE**

The meaning of marriage can be looked at from a legal perspective. Legally, marriage is a binding contract<sup>49</sup> between the two parties. The basic elements of a marriage are: (1) the parties' legal ability to marry each other, (2) mutual consent of the parties, and (3) a marriage contract as required by law. Marriage is recognized by the State, and dissolving the contract can only happen through the legal process of divorce, or by death.

The concept of family in a legal sense has always been a factor that distinguishes and characterizes different legal systems. The European context presents great diversity among national legal systems with respect to the legal notion of family. There also appear to be significant differences on the Community level in the legal notions of family that

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<sup>46</sup> MATULIENĖ, *supra* note 40, pp. 53.

<sup>47</sup> BAJORIŪNAS, *supra* note 30, pp. 8-9.

<sup>48</sup> REIFELD, *supra* note 22, pp. 32-33.

<sup>49</sup> MACK, D., & BLANKENHORN, D., *The Book of Marriage*, New York: William B. Eerdmans Publishing Company, 2001, p. 3.

both national courts and Community case law enforce<sup>50</sup>.

The traditional concept of a legal family resulting from the historical development of different legal traditions is based on the institution of marriage. Whether it is a common-law marriage, or the so-called 'continental' marriage, or even an Islamic marriage with its own specific features including openness to polygamy, marriage as the institution founding the family is historically a union between a man and a woman<sup>51</sup>.

Marriage is usually<sup>52</sup> defined as the legitimate union between husband and wife. "Legitimate" indicates the sanction of some kind of law, natural, church, or civil, while the phrase, "husband and wife", implies mutual rights of sexual intercourse. It organizes life in common, and implies an enduring union. The definition, however, is broad enough to comprehend polygamous and polyandrous unions when they are permitted by the civil law; for in such relationships there are as many marriages as there are individuals of the numerically larger sex.

The family appears to have global significance and meaning, appearing in Article 16 of the Universal Declaration of Human Rights where it is proclaimed as 'the natural and fundamental group unit of society'<sup>53</sup>.

The concept of family life has evolved steadily in the lifetime of the European Convention of Human Rights and it continues to develop so as to take account of social and legal change. Similar to the concept of private life, therefore, the Court maintains a flexible approach to the interpretation of family life, bearing in mind the diversity of modern family arrangements, the implications of divorce and medical advances. According to the wording of the provision, family life is located squarely within the private sphere, where it is entitled to function free from arbitrary state interference. However, Article 8 does not contain a right to establish family life, for example by marrying or having the

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<sup>50</sup> MARELLA, M., "The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law", *European Law Journal*, 2006 (12 (1)), 78–105.

<sup>51</sup> GIARDINI, F., *The Concept of "Legal Family" in Modern Legal Systems: a Comparative Approach* [interactive], <http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Giardini.pdf>, (last visited October 29, 2013).

<sup>52</sup> Same-sex marriage (also known as gay marriage) is marriage between two persons of the same biological sex and/or gender identity. As of 19 August 2013, fifteen countries (Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, Uruguay) and several sub-national jurisdictions (parts of Mexico and the United States) allow same-sex couples to marry. Legislation to allow same-sex marriage in England and Wales was passed by the Parliament of the United Kingdom in July 2013 and came into force on 13 March 2014, and the first same-sex marriages took place on 29 March 2014.

<sup>53</sup> Universal Declaration of Human Rights, United Nation doc. A/811 (1948).



opportunity to have children<sup>54</sup>.

According to the international recommendations, “marriage is the act, ceremony or process by which the legal relationship of husband and wife is constituted. The legality of the union may be established by civil, religious or other means as recognized by the laws of each country”<sup>55</sup>.

The family is not a naturally occurring phenomenon but a concept which is constructed in a multiplicity of ways and for a variety of purposes. This plurality of ‘ways of seeing’ helps to explain why, because of the motivation and policies behind their creation at different times, laws may appear to be predicated upon models of the family which not only conflict with non-legal conceptions but which may even be internally inconsistent<sup>56</sup>.

In order to answer the question formulated in the introduction and to validate the research hypotheses that I have posited, it is appropriate to present the current legal status of marriage and family in Lithuania.

In the Constitution of the Republic of Lithuania adopted by the people of Lithuania by referendum in 1992, the family is protected as a separate value. Article 38 of the Constitution states: ‘The family shall be the basis of society and the State. Family, motherhood, fatherhood and childhood shall be under the protection and care of the State. Marriage shall be concluded upon the free mutual consent of man and woman. The State shall register marriages, births, and deaths. The State shall also recognize church registration of marriages. In the family, the rights of spouses shall be equal. The right and duty of parents is to bring up their children to be honest people and faithful citizens and to support them until they come of age. The duty of children is to respect their parents, to take care of them in their old age, and to preserve their heritage.’

Article 39 of the Constitution contains a provision on the State’s social commitment towards children and families that raise and bring up children: ‘The State shall take care of families that raise and bring up children at home, and shall render them support according to the procedure established by law. The law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions

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<sup>54</sup> Article 12 ECHR guarantees the right to marry and found a family.

<sup>55</sup> UN - United Nations. 2001. Principles and Recommendations for a Vital Statistics System –Revision 2. United Nations Publication ST/ESA/STAT/SER.M/19/Rev.2, New York, p. 11.

<sup>56</sup> The Lithuanian Republic Constitution, accepted in the Referendum on 25<sup>th</sup> October, 1992 // State news,

and other concessions. Children who are under age shall be protected by law.’

The above provisions of the Constitution constitute the basis of state family policy. As the Constitution is the principal national source of family law and a measure of control over the legislative authority’s decisions, family relations must be regulated according to the Constitution. Recognition of the status of family as a constitutional value mandates the state authorities to care and provide for the family, ensure the family members’ Constitutional rights, and ensure respect for family life<sup>57</sup>.

According to one of the drafters of the Constitution, former Judge of the Constitutional Court, professor Egidijus Jarašiūnas, the Constitution establishes a concept of effective, functioning, but not of formal family. This means that in the Constitution, the family is understood as a certain functioning social reality, the essence of which is relations or a certain integral set of relations. He distinguishes ‘two constitutionally important pillars of the family-two principal anchors: matrimony and consanguinity’. Matrimony refers to a union between man and woman, a voluntary agreement to live as a family. Con-sanguinity refers to relation by birth between persons as the basis for living together<sup>58</sup>.

Professor Pranciškus Stanislovas Vitkevičius provides an even narrower concept of family. He states that ‘marriage constitutes the basis and onset of a normal family that the State protects and cares for above all else’<sup>59</sup>. He is convinced that ‘upon the dissolution of marriage, the family automatically breaks up. After the dissolution of marriage, children remain to live with one of the parents and thus a new family is formed. Meanwhile, the other parent who, after the dissolution of marriage, does not live together or lives in a separate room of the same apartment is no longer a member of the former family and remains only the subject of familial relations according to blood relations with respect to the children<sup>60</sup>’.

The Article 3.7 of the Civil Code defines marriage as a “voluntary agreement [...] to create legal family relations”, while the Article 3.12 explicitly prohibits marriage between two individuals of the same sex. Therefore it can be interpreted that the provisions

<sup>57</sup> SAGATYS, G., “The Concept of Family in Lithuanian Law”, *Jurisprudencija*, 2010 (119), 184-186.

<sup>58</sup> JARAŠIŪNAS, E., *Šeimos Konceptijos Pagrindai 1992 m. Lietuvos Respublikos Konstitucijoje*. [The Basis of the Conception of Family in the 1992 Constitution of Lithuania], [http://www.lrkt.lt/APublikacijos\\_20071211a.html](http://www.lrkt.lt/APublikacijos_20071211a.html), (last visited October. 25, 2013).

<sup>59</sup> VITKEVIČIUS, P., *Šeimos Narių Turtiniai Teisiniai Santykiai* [Legal Relations between Family Members], Vilnius: Justitia, 2006, p. 34-36.

<sup>60</sup> *Id.*, p. 35.

in the Civil Code clearly points towards conditioning the effective enjoyment of the right to family life upon the individual capacity person of a different sex.

In 2008 the Lithuanian Parliament adopted the State Family Policy Concept, defining family as 'spouses and their children (including adopted) if any'<sup>61</sup>.

Under Article 1.4. of this Concept the family is the principal good of the society, arising from human nature and based on voluntary matrimonial pledge of a man and a woman to devote their life to developing family relations, ensuring the welfare of all family members- man and a woman, children and all generations and the development of a healthy society the vitality and creativity of the people and the State.

The process of formulating the concept of family is a complicated one in Lithuania. The majority of leading political forces in Lithuania as well as legal doctrine follow the classical, conservative interpretation of the concept of family<sup>62</sup>.

To summarise the law's approach to defining a family, the law does not restrict the definition of family life to those who are married or those who are related by blood. It is willing to accept that other less formal relations can be family if they can demonstrate a sharing of lives and degree of intimacy and stability. Subsequently over different national legislation we find different types of "marriages" or partnerships acknowledged in the law. However, it would be wrong to say that the law takes a purely functional approach, because if a couple are married they will be regarded as family, even though their relationship is not a loving, committed, or stable one<sup>63</sup>.

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<sup>61</sup> Resolution of the Seimas of the Republic Lithuania, „On the Approval of the State Family Policy Concept“, No. X-1569, 3 June 2008. <http://www.arsuaga.net/wp-content/uploads/lithuanian-state-family-policy-concept-june-2008.pdf>, (last visited October. 25, 2013).

<sup>62</sup> SAGATYS, *supra* note 57, p. 186.

<sup>63</sup> HERRING, J., *Family Law*, Oxford: Oxford University Press, 2001, p. 6.

## V. THE MEANING OF MARRIAGE AND FAMILY IN NON CHRISTIAN RELIGIOUS COUNTRIES

The meaning of marriage in non Christian religious countries<sup>64</sup> can be quite different as they host their own traditions, cultures, religions and mentality.

In Judaism, marriage is based on the laws of the Torah and is a contractual bond between a man and a woman in which the woman dedicates herself to be the exclusive woman of a single man<sup>65</sup>. This contract is called *Kiddushin*. Though procreation is not the sole purpose, a Jewish marriage is also expected to fulfil the commandment to have children<sup>66</sup>. The main focus centres around the relationship between the husband and wife. Kabbalistically, marriage is understood to mean that the husband and wife are merging into a single soul. This is why a man is considered "incomplete" if he is not married, as his soul is only one part of a larger whole that remains to be unified<sup>67</sup>.

In Islamic countries family law seeks to achieve the success and stability of marriage by taking steps which guarantee favourable circumstances for concluding the contract. Marriage is regarded as a permanent contract lasting for life. To establish the contract of marriage, it must be concluded by mutual consent between a man and a woman. Islamic law stipulated many conditions for a marriage to be valid. Most important is the witnessing of the contract by two men who should be of good character, adult, sane and capable of understanding the terms of the contract and the language of the two parties<sup>68</sup>.

For example, under Article 4 of the Algerian Family Code<sup>69</sup> marriage is not defined simply by its object, but is more broadly presented as a contract formed between a man and a woman, in legal form. It has, among other aims, the founding of a family based on affection (*mawada*), domestic tranquillity (*rahma*) and mutual assistance and the moral

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<sup>64</sup> As was indicated in the introduction in order to disclose similarities and however the differences and to determine the boundaries of the analogy of the Church and State attitude to the marriage institution in this thesis were introduced some comparative aspects of the institution of marriage in non Christian religious countries.

<sup>65</sup> KATZ, D., *Lithuanian Jewish culture*, Vilnius: Baltos Lankos, 2004, p. 112.

<sup>66</sup> KATZ, D., *Windows to the lost Jewish past*, Vilnius: Versus Aureus, 2008, pp. 24-26.

<sup>67</sup> *Why Marry?* [http://www.chabad.org/library/article\\_cdo/aid/448425/jewish/Why-Marry.htm](http://www.chabad.org/library/article_cdo/aid/448425/jewish/Why-Marry.htm), (last visited June 12, 2013).

<sup>68</sup> KASSEM, U. and ELSHAHHAT, A., *Egyptian Family Law Reform and the Improvement of the Status of Women*, Boston: Kluwer Law, 1998, pp. 48-49.

<sup>69</sup> The Code is based on Islamic law, but takes account of the development of Algerian society, especially in the last hundred years, under the pressure of so-called „modernist“ ideas held by the elite of some countries of Islamic civilisation, and also the direct and indirect influence of French colonial rule in Algeria (1830-1962).

protection of the spouses for the preservation of family ties<sup>70</sup>.

New China's ideal marriage is based on free choice for both partners, monogamy, family planning, equal rights for the sexes and particular protections for those who were oppressed by marriage in the past – women, children and elderly<sup>71</sup>.

In many societies marriage links not just nuclear families but larger social formations as well. Some endogenous societies are divided into different exogamous groups (such as clans or lineages): Men form alliances through the exchange of women, and the social organization regulates these alliances through marriage rules. In some cases, two men from different groups exchange sisters for brides<sup>72</sup>. Other instances involve an adult man marrying the young or infant daughter of another man; sexual relations would be deferred for many years, but the two men will have formed a strong bond. Marriages are often arranged by the families through the services of a matchmaker or go-between, and commence with a ritual celebration, or wedding. Some cultures practice trial marriage; the couple lives together before deciding whether they should marry<sup>73</sup>. Society generally prescribes where newlywed couples should live: In patrilocal cultures, they live with or near the husband's family; in matrilocal ones, with or near the wife's family. Under neolocal residence, the couple establishes their own household<sup>74</sup>.

As it always has, the meaning of marriage is changing as the times change. These changes may or may not be a good thing; in the end, they are probably a little of both. The meaning of marriage, in the modern world, is in a bit of flux; when people do get married, they should make sure that they agree up front on what they mean by marriage.

Currently family is still very important, although individuals have become less dependent. Social, economic or other types of individual independence, especially in economically developed countries, weaken the family institutions.

This work concentrates on spouses, who are considered the nucleus or centre of the family around which other family members circle. It leaves aside economic and social analysis of the family as long as it is not related to the institution of marriage. This

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<sup>70</sup> MAHIEDDIN, N., "Marriage: its Formation and Effects in Algerian Substantive", *International Survey of Family Law*, 1994 (28), 1-3.

<sup>71</sup> SHAOYUAN, W., *Exploring Traditional Marriage Customs in China*, New York: McGraw Hill, 2008, p. 7.

<sup>72</sup> HENSLIN, *supra* note 18, p. 28.

<sup>73</sup> CHERLIN, A., *The Marriage-Go-Round*, New York: Knopf, 2010, 24-26.

<sup>74</sup> COLLIER, J., *Marriage and Inequality in Classless Societies*, Stanford: Stanford University Press, 1988, p. 89.

dissertation endeavours to show the evolution and development of the marriage institution and to investigate the regulation of the marriage institution by the church and state laws.

## Chapter 2

### *Importance of marriage and family in civil and religious systems*

Marriage has always been a very important institution of human life. It has the feature of social, human natural and religious institutions<sup>75</sup>. Marriage is of the highest social value<sup>76</sup>. For many ages marriage has been the most important institution of social protection for people. It granted the social status to the people, guaranteed their welfare, the thing that is now called social securities<sup>77</sup> – such social security as insurance or old-age pension was not popular through all the human history until recently. Even in recent times, in the modern, economically developed society the single persons but not those who live in families have been the ones who usually ask and receive social benefits<sup>78</sup>. The family has always been considered as a small but a very important and fundamental kernel of society, it has even been called a model of society. Therefore, philosophers and politicians from ancient times have been relating the welfare of the State (social society) with the family institution. “A strong family is a strong nation” – this and other statements have been repeated with authority since the oldest civilizations. Thus, the social importance and meaning of the family institution have been certified, testified, evaluated and cherished by the universal tradition and customs, scientific authorities, and public laws<sup>79</sup>.

The family institution is of natural importance as it satisfies the principal laws of human nature and, therefore, acquires natural rights. The family is the place where the natural human right to private property is obtained and realized. The family actualizes the commonness of inseparable life of man and woman. In family there are children born, who have their natural rights to father and mother, to security, provision, education and support<sup>80</sup>.

The Civil Code of the Republic of Lithuania defines the concept of marriage as a

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<sup>75</sup> WALZER, L., *Marriage on Trial: A Handbook with Cases, Laws and Documents*, Santa Barbara: ABC-CLIO Press, 2005, p. 5.

<sup>76</sup> BRUCE, C., *Remarks to the World Congress of Families*, <http://worldcongress.org/wcf4.spkrs/wcf4.hafen.htm>, (last visited June 12, 2013).

<sup>77</sup> MARTIN, P., *Social Security Benefits for Spouses*, <http://www.law.cornell.edu/socsec/course/readings/spouses.htm>, (last visited April 18, 2013).

<sup>78</sup> DE VAUS, D., *Diversity and Change in Australian Families*, Melbourne: Australian Institute of Family Studies, 2004, pp. 9-10.

<sup>79</sup> BAJORIŪNAS, *supra* note 30, p. 26.

<sup>80</sup> MATULIENĖ, *supra* note 40, pp. 51.

simple institution, where the legal family relations are valid<sup>81</sup>. These relations, which consist of mutual duties and rights, are not named or substantiated by certain conditions. The Civil Code pays the biggest attention to the legality of marriage conclusion, its recognition, and management of joint property, rights and duties of the spouses and their children in case of marriage dissolution or other restrictions. The civil law recognizes that joint rights and duties of the spouses belong to the natural law, thus, the marriage institution arises and is supported by the natural law.

The United States Supreme Court has noted that "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"<sup>82</sup> that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause,"<sup>83</sup> and has stated the following about marriage:

*"It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"*<sup>84</sup>.

Marriage also is of juridical importance because marriage gives a variety of rights, privileges, and obligations that are unique to the institution of marriage. "In short, the marriage laws transform a private agreement into a source of significant public benefits and protections"<sup>85</sup>.

The majority of modern states and their legal systems are secular, i.e. they do not profess any religion, they are temporal states, but their citizens have a right to profess the confessions individually, to follow them and to belong to religious communities<sup>86</sup>.

The democratic systems of modern civilization recognize the freedom of belief of their citizens and respect their obligations to the Canon law. Thus, the civil law recognizes the marriages, which are concluded following the Canon law. All the confessions recognize marriage as a religious matter and subject subordinated to the spiritual law. Matrimonial rights and duties are related not just in the external public life, but also in the internal area of the conscience.

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<sup>81</sup> Lithuanian Civil Code. Art. 3.7.

<sup>82</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967), quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>83</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

<sup>84</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

<sup>85</sup> *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999).

<sup>86</sup> MADELEY, J. and ZSOLT, E., *Church and State in Contemporary Europe: the Chimera of Neutrality*, Cambridge: Cambridge University Press, 2003, p. 14.



This study does not aim to get deep into the substantiation of the religious character of the marriage. All the religions state the importance of this characteristic, and all the modern civilized legal systems recognize it. It is important to recognize that the marriage institution has not only social and natural dimensions, but also a religious dimension.

As the concept of marriage is based on historically formed family values and to be able to validate my research hypotheses, in the next chapter of this study, I will present a historical background of the family.

## **Chapter 3**

### ***The historical background of family***

#### **I. EARLY PERIOD**

Marriage and family belong to the oldest and most widespread social institutions. For many people, they are core elements of human development as well as for the social cohesion of society<sup>87</sup>.

Marriage is acknowledged in the New Testament scriptures. The first recorded miracle by Jesus is at a wedding feast in Cana, and the Catholic Church believes this signifies his approval of the institution of marriage as well as his recognition of the importance of the public celebration of a wedding<sup>88</sup>. The Letter to the Ephesians, traditionally attributed to the Apostle Paul, draws upon this to express one of the most often quoted descriptions of the proper behaviour of spouses in the ideal sacramental marriage.

At the time of Jesus marriage was considered a necessary passage into adulthood, and strongly supported within the Jewish faith. The author of the letter to the Hebrews declared that marriage should be held in honour among all, and early Christians defended the holiness of marriage against the Gnostics and the Antinomians<sup>89</sup>.

Hints about the marriage and family institution can be found in the Bible too. According to the Bible the first couple was Adam and Eve. Bible division of town and village is based on family as well. According to the Bible, after the Deluge only one family survived, from which many new races appeared. Judaism and other religions have features of family. In Judaism God is called a father and a spouse of the nation. In many cases in the Old Testimony God is called Father and people are his children<sup>90</sup>.

Tertullian (ca. 160 – ca. 225) spoke of Christians as "requesting marriage" from their priests and wrote of Christian marriage in these terms: "How shall we ever be able

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<sup>87</sup> REIFELD, *supra* note 22, p. 11.

<sup>88</sup> BURRIDGE, R., *Imitating Jesus: An Inclusive Approach to New Testament Ethics*, Michigan: NM. B. Eerdmans Publishing Co., 2007, pp. 290-293.

<sup>89</sup> LAWLER, M., *Marriage and Sacrament— a Theology of Christian Marriage*, Collegeville: The Liturgical Press, 1993, p. 54.

<sup>90</sup> MASIULIS, B., *Santuoka. Lietuvių Enciklopedija 456*, Bostonas: Lietuvių Enciklopedijos Leidykla, 1963, p. 29. [MASIULIS, B., *Marriage. Lithuanian Encyclopedia 456*, Boston: Lithuanian Encyclopedia Publishing, 1963].

adequately to describe the happiness of that marriage which the Church arranges, the Sacrifice strengthens, upon which the blessing sets a seal, at which angels are present as witnesses, and to which the Father gives His consent? For not even on earth do children marry properly and legally without their fathers' permission. How beautiful, then, the marriage of two Christians, two who are one in hope, one in desire, one in the way of life they follow, one in the religion they practice. They are as brother and sister, both servants of the same Master. [...] They have no secrets from one another; they never shun each other's company; they never bring sorrow to each other's hearts..."<sup>91</sup>.

Cyprian (ca. 200 – 258), Bishop of Carthage, recommended, in his *Three Books of Testimonies against the Jews* that Christians should not marry pagans<sup>92</sup>. Addressing consecrated virgins, whom he exhorted to avoid extravagance in dress and such activities as attending bawdy wedding celebrations and going to the public baths with men, he wrote: "The first decree commanded to increase and to multiply; the second enjoined continence. While the world is still rough and void, we are propagated by the fruitful begetting of numbers, and we increase to the enlargement of the human race. Now, when the world is filled and the earth supplied, they who can receive continence, living after the manner of eunuchs, are made eunuchs unto the kingdom. Nor does the Lord command this, but He exhorts it; nor does He impose the yoke of necessity, since the free choice of the will is left"<sup>93</sup>.

Jerome (ca. 347 – c. 420) showed bitter hostility to marriage akin to Manichean dualism<sup>94</sup>, an accusation that Jerome rebutted in his *Adversus Jovinianum*: "We do not follow the views of Marcion and Manichaeus, and disparage marriage; nor, deceived by the error of Tatian, the leader of the Encratites, do we think all intercourse impure; he condemns and rejects not only marriage but also food which God created for the use of man. We know that in a great house, there are not only vessels of gold and silver, but also of wood and earthenware. [...] While we honour marriage we prefer virginity which is the

<sup>91</sup> TERTULLIAN, *Ad Uxorem*, book 2, ad finem. HOOPER, J., *Translations*, The Seconde Booke of Tertullian vnto his wyf, tr. [by j. Hooper], London: r.jugge (1550), [http://www.tertullian.org/works/ad\\_uxorem.htm](http://www.tertullian.org/works/ad_uxorem.htm), (last visited October. 25, 2013).

<sup>92</sup> CYPRIAN, *Three Books of Testimonies Against the Jews*, Book 3, 62, <http://www.tertullian.org/fathers2/ANF-05/anf05-122.htm>, (last visited October. 25, 2013).

<sup>93</sup> CYPRIAN, *Treatise 2, On the Dress of Virgins*, <http://www.newadvent.org/fathers/050702.htm>, (last visited October. 25, 2013).

<sup>94</sup> ARMSTRONG, K., *The Gospel According to Woman: Christianity's Creation of the Sex War in the West*, London: Pan Books, 1986.

offspring of marriage<sup>95</sup>.“

Augustine (ca. 354– c. 430), whose views subsequently strongly influenced Western theology<sup>96</sup>, developed a theology of the sacramentality of Christian marriage. In his *On the Good of Marriage*, of 401, he distinguished three values in marriage: fidelity, which is more than sexual; offspring, which "entails the acceptance of children in love, their nurturance in affection, and their upbringing in the Christian religion; and sacrament, in that its indissolubility is a sign of the eternal unity of the blessed<sup>97</sup>.

In ancient Rome, the law of marriage was part of the law of persons because for the Romans marriage was a fact that determined the status of a person in their society. If man and a woman were living together with marital affection, *affectu maritali*, and if they were legally capable of being married, they were married in the eyes of the law. The Romans did not think of marriage as a contract since the marital state did not generate legally<sup>98</sup> actionable obligations<sup>99</sup>.

During Roman times, consent was the condition essential to a valid marriage. At first this consent was required of the families involved. Later mutual consent was required of the principals, as signified by the Roman maxim, "Marriage is by consent only"<sup>100</sup>.

"Roman marriage custom was ahead of many of its contemporaries in requiring the consent of both principals as a condition of a valid marriage, a rule expressed in the legal formula *Nuptias consensus non concubitus facit* (consent, not intercourse, makes marriage).<sup>101</sup>"

During the fall of the Rome empire, when Christianity and other 'pagan sects' appeared, there existed a triple outlook into marriage and family institutions: negative, tolerant and positive<sup>102</sup>.

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<sup>95</sup> SCHAFF, P., *Nicene and Post-Nicene Fathers*, Second Series, Volume VI Jerome Against Jovinianus, Book 1, 3, New York: Cosimo Inc., 2007, p. 347.

<sup>96</sup> FIORENZA, F. and GALVIN, J., *Systematic Theology: Roman Catholic Perspectives*, New York: Fortress Press, 2011, pp. 592-594.

<sup>97</sup> *Id.*, p. 593.

<sup>98</sup> This is not to say that there were no legal effects to marriage; there were, but not by way of obligations, which arose from contracts and delicts only.

<sup>99</sup> ÖRSY, M., *Marriage in Canon Law*, Delaware: Michael Glazier, 1986, p. 27.

<sup>100</sup> GOODSELL, W., *A History of Marriage and the Family*, Barcelona: Editorial Araluce, 1934, pp. 135-136.

<sup>101</sup> GEIS, F. and GEIS, J., *Marriage and the Family in the Middle Ages*, New York: Harper Collins Publishers, 1987, p. 21.

<sup>102</sup> ÖRSY, *supra* note 99, p. 27.

## II. MARRIAGE INSTITUTION IN THE MIDDLE AGES

The law of marriage of Western Europe of the Middle Ages was canon law, and it was complicated. By the beginning of the thirteenth century, the period in which we first have records of runs of cases, it was the product of a continuous development of more than seven hundred years with roots going back into Roman law, Judaism, and early Christianity, and the customs of the non-Roman peoples of the West. A particularly notable feature of this development was the extraordinary efflorescence of learning, teaching, and promulgating law that occurred in the twelfth century<sup>103</sup>.

With the spread of Christianity and through the later Middle Ages, the Roman Catholic Church and the canon law promulgated by the Church gained influence in determining the validity of marriage and were gradually introduced into the marriage ceremony. Initially, the Church accepted the private betrothal and wedding rites of the Romans and Germanic peoples and allowed them to continue, merely urging the church's followers to seek a priest's blessing for their marriage<sup>104</sup>. Between the 11th and 12th centuries, the Church had gained exclusive jurisdiction over issues related to marriage in Europe and had the power to determine the validity of marriages. By the end of the 12th century, the Church had developed a comprehensive canon law of marriage which became only theory of marriage<sup>105</sup>. Between the 10th and 13th centuries, the Church continued to make more fervent demands that its followers be married in a church ceremony and provided for censure of those who did not comply. This was probably an attempt to both provide more of a religious tone to the institution and to provide for publicity of the marriage to avoid the problems attributable to clandestine marriages<sup>106</sup>. However, even as the Church increased its demands regarding marriage formalities, because marriage was viewed as a sacrament by the Church and subject to natural law, the Church was reticent to declare private marriages invalid or void<sup>107</sup>.

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<sup>103</sup> DONAHUE, CH., *Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts*, New York: Cambridge University Press, 2007, p. 14.

<sup>104</sup> HOWARD, G., *A History of Matrimonial Institutions*, Chicago: University of Chicago Press, 1904, p. 293.

<sup>105</sup> SCHROEDER, J., *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist*, Iowa: Jurisprudence, 1990, p. 75.

<sup>106</sup> HOWARD, *supra* note 104, p. 293.

<sup>107</sup> *Id.*, pp. 334-39.

The medieval Christian Church continued to recognise matrimony as a sacrament, a term applied to it already by Augustine, as shown above. Although separation occurred from Oriental Orthodoxy in 451 and Eastern Orthodoxy in 1054, these too continue to consider marriage a sacrament<sup>108</sup>. In medieval times, the Church did not consider the sacraments equal in importance any more than it does today<sup>109</sup>. Marriage was never considered to be one of the sacraments of Christian initiation (Baptism, Confirmation, Eucharist) or of those that confer a character (Baptism, Confirmation, Holy Orders)<sup>110</sup>.

The first official declaration that marriage is a sacrament was made at the 1184 Council of Verona as part of a condemnation of the Cathars<sup>111</sup>.

In 1208, Pope Innocent III required members of another religious movement, that of the Waldensians, to recognize that marriage is a sacrament as a condition for being received back into the Catholic Church<sup>112</sup>.

The Fourth Lateran Council of 1215 had already stated in response to the teaching of the Cathars: "For not only virgins and the continent but also married persons find favour with God by right faith and good actions and deserve to attain to eternal blessedness<sup>113</sup>."

In 1254, Catholics accused Waldensians of condemning the sacrament of marriage, "saying that married persons sin mortally if they come together without the hope of offspring"<sup>114</sup>.

Marriage was also included in the list of the seven sacraments at the Second Council of Lyon in 1274 as part of the profession of faith required of Michael VIII Palaiologos. The sacraments of marriage and holy orders were distinguished as sacraments that aim at the "increase of the Church" from the other five sacraments, which are intended

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<sup>108</sup> *Eastern Orthodox teaching on the sacrament of marriage*. <http://oca.org/orthodoxy/the-orthodox-faith/worship/the-sacraments/marriage>; *Oriental Orthodox teaching on the sacrament of marriage*, [http://www.copticchurch.net/topics/thecopticchurch/sacraments/6\\_matrimony.html](http://www.copticchurch.net/topics/thecopticchurch/sacraments/6_matrimony.html), (last visited December 25, 2013).

<sup>109</sup> ARMSTRONG, *supra* note 94, pp. 115-118; *Catechism of the Catholic Church*, 1324, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p2s2c1a3.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c1a3.htm), (last visited December 25, 2013).

<sup>110</sup> *Summa Theologica, Part III, Question 63*, <http://www.newadvent.org/summa/2063.htm>, (last visited December 29, 2013).

<sup>111</sup> FIORENZA, *supra* note 96 p.320.

<sup>112</sup> *Id.*

<sup>113</sup> MOORE, J., *Pope Innocent III*, Leiden: Brill, 2003, p. 240.

<sup>114</sup> THOMSETT, M., *Heresy in the Roman Catholic Church: A History*, Jefferson: McFarland and Company Publishers, 2011, p. 105.

for the spiritual perfection of individuals. The Council of Florence in 1439 again recognised marriage as a sacrament<sup>115</sup>.

The medieval view of the sacramentality of marriage has been described as follows: "Like the other sacraments, medieval writers argued, marriage was an instrument of sanctification, a channel of grace that caused God's gracious gifts and blessings to be poured upon humanity. Marriage sanctified the Christian couple by allowing them to comply with God's law for marriage and by providing them with an ideal model of marriage in Christ the bridegroom, who took the Church as his bride and accorded it highest love, devotion, and sacrifice, even to the point of death<sup>116</sup>."

From the 13th to the 16th centuries, even as the Church increasingly required more formalization and publicity of and intervention in marriages, the Church continued to recognize private, informal marriages as valid, based on their sacramental<sup>117</sup>, divinely ordained nature<sup>118</sup>. However, any marriage contracted without the Church's intervention, although binding, was "irregular" in the eyes of the Church and subject to ecclesiastical penalties such as severe penance<sup>119</sup>.

In the Middle Ages the Church had the exceptional right to formalize marriage. At the same time scientists contradicting religious dogmas appeared<sup>120</sup>.

Getting married in the Middle Ages of Lithuania<sup>121</sup> was a relatively simple process. The man and woman joined hands and spoke specific words that made the vows. Mutual consent was required, and the woman had to be twelve years old and the man fourteen<sup>122</sup>.

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<sup>115</sup> FIORENZA, *supra* note 96, p. 322; *The Seven Sacraments: Catholic Doctrinal Documents*, <http://www.fordham.edu/halsall/source/1438sacraments.asp>, (last visited December. 29, 2013).

<sup>116</sup> WITTE, J., *From Sacrament to Contract*, Cambridge: Presbyterian Publishing, 2012, p. 92.

<sup>117</sup> BELLITTO, C., *The General Councils: A History of the Twenty-one Church Councils*, New York: Paulist Press, 2002, p. 105.

<sup>118</sup> ENGDAHL, D., *The Secularization of English Marriage Law*, Los Angeles: University of Southern California, Law Review, 1968, pp. 24-27.

<sup>119</sup> GOODSSELL, *supra* note 100, p. 223.

<sup>120</sup> MASIULIS, *supra* note 90, pp. 20-21.

<sup>121</sup> Historians designate Lithuania Proper (or Land of Lithuania in a narrow sense) as a Lithuanian land that existed prior to Grand Duchy of Lithuania (the Grand Duchy of Lithuania was a European state from the 12th century until 1795), near other lands: Land of Nalšia, Land of Deltuva, Land of Upytė. According Henryk Łowmiański Lithuania Proper was in nucleus of future Trakai Voivodeship between rivers: Nemunas, Neris and Merkys. Tomas Baranauskas suggests that Lithuania Proper was around Ashmyany area, then ethnic Lithuanian lands now in Belarus. According to Mikola Yermalovich (although his reliability is questioned by other scholars) Lithuania (Belarusian: Ляванічная Літва, literary: Lithuania of chronicles) was in the upper Neman region, now in modern Belarus. Look at the map showing changes in the territory of Lithuania from the 13 th. Century to the present time in the appendix No. 3.

<sup>122</sup> DIČIUS, P., *Santuoka ir Šeima Tarybų Lietuvoje*, Vilnius: Mintis, 1974, pp. 7-10. [DIČIUS, P., *Marriage*

Many nations including Lithuania considered marriage to be a private affair, the matter of two (bed and table relations). The Early Ages witnessed marriage without additional help, so a couple had some food and drink from the same goblet and went to bed together. This tradition we can see in Ancient India, it existed in Lithuania as well<sup>123</sup>.

Marriages in the Middle Ages were by mutual consent, declaration of intention to marry and upon the subsequent physical union of the parties<sup>124</sup>. The couple would promise verbally to each other that they would be married to each other; the presence of a priest or witnesses was not required for validity<sup>125</sup>. This promise was known as the "verbum." If freely given and made in the present tense (e.g., "I marry you"), it was unquestionably binding<sup>126</sup>; if made in the future tense ("I will marry you"), it would constitute a betrothal. One of the functions of churches from the Middle Ages was to register marriages, which was not obligatory. There was no state involvement in marriage and personal status, with these issues being adjudicated in ecclesiastical courts.

### III. DEVELOPMENT OF CHURCH MARRIAGE INSTITUTION

The Church considers the nature of marriage as God's creation. The marriage institution was developed and perfected through history and different cultures. The Christian marriage institution was formed under the influence of legal tradition of Jews, Romans and Germans<sup>127</sup>.

In Byzantium Christians made the marriage covenant "as everyone"<sup>128</sup>. Usually the ceremony was conducted by the father of the family. The ceremony took place only at home and special gestures were used, for example, joining of hands of newlyweds. Christians eliminated all traces of heathenism from the home ceremony. They paid special attention to the procreation and upbringing of children; accepted the supervision of the

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*and Family in Soviet Lithuania*, Vilnius: Mintis, 1974].

<sup>123</sup> MASIULIS, *supra* note 90, pp. 29-30.

<sup>124</sup> MCSHEFFREY, S., *Marriage, Sex, and Civic Culture in Late Medieval London*, Philadelphia: University of Pennsylvania Press, 2006, pp. 15-17.

<sup>125</sup> *Marriage Records*, <http://www.exploreancestry.co.uk/FindingEarlyMarriageRecords.html>, (last visited December. 29, 2013).

<sup>126</sup> CERETI, G., *Divorzio Nuove Nozze E Penitenza Nella Chiesa Primitiva*, Bologna: Edizioni Dehoniane, 1977, pp. 51-53.

<sup>127</sup> HUNTER, D., *Marriage in the Early Church*, Oxford: Oxford Early Christian Studies, 2001, p. 17.

<sup>128</sup> *Id.*



pontiff for marriage; the Christians expressed special obedience to God and religion by marriage; sometimes the ceremony involved Eucharist and special blessings.

In the first three centuries of the Church, marriage was simply approached in a matter of fact manner. Christians married according to family local customs. There were no church ceremonies for marriage<sup>129</sup>.

In the fourth century we find a gradual emergence of what might be called paraliturgical rituals associated with marriage. A special blessing was locally offered upon by clerics who received the power to solemnize marriages. Weddings for the most part, however, were still customary settings of family or local community<sup>130</sup>.

From the 4<sup>th</sup> to 11<sup>th</sup> century<sup>131</sup>, Christians started to pay special attention to marriage by giving marriage and the marriage ceremony a special Christian meaning. As a result matrimonial blessings appeared. At first, the matrimonial blessing was only given in Rome and Milan after placing a headdress on the head of the bride, in the East during coronation of the newlyweds and in Gaul and Spain after the newlywed couple entered a wedding room. At first the matrimonial blessing of the Church was given only to marriages of clerics and their children. Later, the blessing was given to general believers during Mass. In some cases; the Church demanded spouses to get permission from the pontiff.

Throughout history, the Church regularly gave opinions on marriage and family. The Church advocated the idea of monogamous marriage concluded by mutual consent of both spouses. In the West, this idea fought the deeply entrenched clannish, country and customs. The intensive introduction of Church policy on marriage and family became possible only after the Great Revolution at the end of the 11<sup>th</sup> century and at the beginning of the 12<sup>th</sup> century. The symbol of this revolution was the revolution of Popes<sup>132</sup>.

In all Catholic countries the Catholic Church took control of marriage matters and from the 12<sup>th</sup> century the Catholic Church started to consider marriage as a Matrimonial Sacrament. For some time canon marriage was not obligatory<sup>133</sup>.

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<sup>129</sup> THOMAS, D., *Christian Marriage: A Journey Together*, Minnesota: The Liturgical Press, 1983, p. 87.

<sup>130</sup> *Id.*

<sup>131</sup> Until IV century, marriage was considered by Christians as natural reality. The marriage was contracted according to the customs of nations and civil jurisdiction. However, people were encouraged to live conscientiously and rely on norms of religion.

<sup>132</sup> MASIULIS, *supra* note 90, pp. 23-24.

<sup>133</sup> GOODY, J., *The Development of the Family and Marriage in Europe*, Cambridge: Cambridge University Press, 1983, pp. 28-30.

During the Middle Ages, the Church was given the exclusive right to register marriages. According to the Prussian Chronicle written by P. Dusburgietis, due to war and social problems the Church had to ensure the publicity of marriage: priests were responsible for civil formalities and for the Church's matrimonial blessing of the spouses. The place for matrimonial consent was moved from the bride's house to the door of the Church. After the introduction of Catholicism<sup>134</sup> to Lithuania, Church, natural and secular law norms were applied for regulating marriage. The following requirements for conclusion marriage were established: age (girls from 12-13, boys from 13-14) and free will of the spouses, etc. Close consanguinity (up to the fourth degree according to Canon Law), affinity (up to third degree), existing previous marriage and non-Christian religion of one of the spouses were considered as impediments for marriage. The marriage of peasants also depended on the will of their lord. A girl marrying a man from the other manor had to get permission from her lord and pay a so-called "marten" tax<sup>135</sup>.

Marriages of Lithuanian Orthodox, Jews and Muslims (Tartars)<sup>136</sup> were concluded under to their customs and traditions. Various Church and secular punishment and fines were applied if the marriage norms were violated. The Church was responsible for conclusion of marriages, for registration of marriage and divorce. Secular courts dealt only with the material disputes related to marriage<sup>137</sup>.

In Catholic Europe the law was eventually rationalized by a decree of the Council of Trent (1563)<sup>138</sup> which invalidated marriages not performed in public before a parish priest, and there were rather similar changes in many continental protestant countries<sup>139</sup>. In Western countries, the Council of Trent<sup>140</sup> formed and enforced the so called Canon

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<sup>134</sup> Ethnic Lithuanian nobles were the main converts to Catholicism (after the Christianization of Lithuania in 1387), but paganism remained strong among the peasantry. Pagan customs prevailed for a long time among the common people of Lithuania and were covertly practiced. There had been no prosecution of priests and adherents of the old faith. However, by the 17th century, following the Counter-Reformation (1545-1648), the Roman Catholic faith had essentially taken precedence over earlier pagan beliefs.

<sup>135</sup> MASIULIS, *supra* note 90, pp. 25-27.

<sup>136</sup> Under Lithuanian Republic statute of religious communities and associations the legislation of the Lithuanian Republic recognizes the marriages concluded by state-recognized religions including Jewish and Muslim religions are recognized in Lithuania and at present time. In order to disclose historical evolution, also similarities and however the differences of the Church and State attitude to the marriage institution in some other chapters of this thesis will be introduced religious and legal aspects of the institution of marriage of Islam and Jewish law.

<sup>137</sup> DIČIUS, *supra* note 122, pp. 12-14.

<sup>138</sup> MULLETT, M., *The Catholic Reformation*, New York: Routledge, 1999, pp. 29-30.

<sup>139</sup> OZMENT, S., *When Fathers Ruled: Family Life in Reformation Europe*, Cambridge: Cambridge University Press, 1983, p. 25.

<sup>140</sup> The decisions of Council of Trent were obligatory only for Catholics in places where the decisions were

marriage, i.e. a couple had to visit a priest of the congregation in order to give matrimonial consent<sup>141</sup>. From the beginning of Christianity the clergy tried to educate people how to celebrate marriage. Special laws were issued for this purpose. The Decree of bishop Michael Junge of Semba (1426) prohibited excessive beer drinking during marriage. According to the teaching of Kartūzas (1428) “sometimes devilish dances take place in the wedding parties as well as on Pancake Tuesday, and wives of worthy men also sew manly clothes”<sup>142</sup>.

The decree Tametsi of 1563 was one of the last decisions made at Trent. MacCulloch says that the decree sought to impose the Church's control over the process of marriage by laying down as strict conditions as possible as to what constituted a marriage<sup>143</sup>. John P. Beal says the Council, "stung by the Protestant reformers' castigation of the Catholic Church's failure to extirpate clandestine marriages", issued the decree<sup>144</sup>, "to safeguard against invalid marriages and abuses in clandestine marriages"<sup>145</sup>, which had become "the scourge of Europe"<sup>146</sup>. In fact, *Tametsi* was never proclaimed worldwide. It had no effect in France, England, Scotland and some other countries<sup>147</sup> and in 1907 was replaced by the decree Ne Temere, which came into effect universally at Easter 1908<sup>148</sup>. The Church maintained some liturgical rituals from old times and encouraged the participation of a priest as a Church witness for marriage. After the declaration of the Tametsi Decree, the participation of a priest and witness became obligatory in canon marriages as well as an obligatory requirement for conclusion a valid marriage.

From early times, the Church priests of Eastern countries actively participated in the celebration of marriage, acting like fathers or guests of the families. This did not mean usurpation, because such participation was related to the satisfaction of family and civil

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announced.

<sup>141</sup> BEQUIRIE, P., *How to Understand Matrimonial Sacraments*, Vilnius: Lithuanian Catechism Centre, 1998, p. 28.

<sup>142</sup> PAKARKLIS, P., *Kryžiuočių Valstybės Santvarkos Bruožai*, Chicago: Chicagos Lietuvių Literatūros Draugija, 1961, p. 263. [PAKARKLIS, P., *Features of the Teutonic State*, Chicago: Lithuanian Literature Association of Chicago, 1961].

<sup>143</sup> MACCULLOCH, D., *Reformation: Europe's House Divided 1490-1700*, London: Penguin, 2008, p. 540.

<sup>144</sup> BEAL, J., CORIDEN, J. and GREEN, T., *New Commentary on the Code of Canon Law*, N.Y: Paulist Press, 2002, p. 1326.

<sup>145</sup> MCGOWAN, M., *Waning of the Green*, Toronto: McGill-Queen's University Press, 1994, p. 105.

<sup>146</sup> SALZMANN, T. and LAWLER, M., *Sexual Ethics*, Washington: Georgetown University Press, 2012, p. 132.

<sup>147</sup> SHELFORD, L., *A Practical Treatise on the Law of Marriage and Divorce*, London: Littell, 1841, pp. 36-37.

<sup>148</sup> BEAL *supra* note 144, pp. 1325-1326; STUART, E., *Dissolution and Annulment of Marriage by the Catholic Church*, Sydney: Federation Press, 1994, p. 75.

authority needs. As a result of evolution, the ceremonies earlier performed in families were gradually included into the liturgical rituals.

#### IV. PREREQUISITES AND NATURE OF CIVIL MARRIAGE

Until the reformation, there were practically no laws for civil marriage. Marriage was concluded according to the requirements of canon law. However, there were enough theoretical interpretations of civil marriage and encouragement for civil marriage. Even at the beginning of Christianity there was plenty of support for civil marriage. In apostolic times<sup>149</sup>, Simon Magus claimed that men can ignore the sanctity of a marriage and use women as objects. Following the ideas of Simon Magus, his follower Saturninus claimed that marriage and procreation of children is not a fruit of God's Will, but of the Devil. After Christianity spread and strengthened, the opponents of marriage sanctity remained. Canonists, nicolaitanes and eutichinits and later donatists, Manichean sect and Peter de Bruys with his supporters fought against marriage sanctity and preached ideas of civil marriages till the times of the reformation<sup>150</sup>.

V. Brizgys, a specialist of canon law of the 20<sup>th</sup> century, has identified the following prerequisites as the origin of civil marriage:

- Creation, development and introduction of philosophical theories.
- Lack of knowledge of religious principles;
- Inability to understand and foresee bad outcomes of this institution;
- Hate for the Catholic Church, its competence and the searching of reasons for justification of anti-ecclesiastical theories;
- Insufficient knowledge and understanding of laws and natural rights, resulting

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<sup>149</sup>The Apostolic Age of the history of Christianity is traditionally the period of the Twelve Apostles, dating from the Crucifixion of Jesus (c. 30-33) and the Great Commission in Jerusalem until the death of John the Apostle (c. 100) in Anatolia. Since it is believed that John lived so long and was the last of the twelve to die, there is some overlap between the "Apostolic Age" and the first Apostolic Fathers, whose writings are used to mark the beginning of the Ante-Nicene Period. It holds special significance in Christian tradition as the age of the direct apostles of Jesus Christ. The major primary source for the "Apostolic Age" is the Acts of the Apostles, but its historical accuracy is questioned by some.

<sup>150</sup> BRIZGYS, V., *Vadinamosios Civilinės Jungtuvės Proto, Teisės ir Istorijos Šviesoje*, Vilnius: Sakalas, 1931, pp. 41-42. [BRIZGYS, V., *So-Called Civil Marriage in the Light of Mind, Law and History*, Vilnius: Sakalas, 1931].

in a misinterpretation of the meaning of marriage<sup>151</sup>.

Martin Luther (1483-1546), a supporter of civil marriage, thought marriage was not a Sacrament, but a “universal matter” that cannot exist without the Christian base, therefore marriage cannot be separated from religion and Church. According to Luther, marriage should be managed by State institutions and concluded in a church. Such marriage was meant only to remind newlyweds of the Christian responsibilities without giving a Sacrament. Luther also acknowledged the divorce of spouses and their right to conclude a new marriage<sup>152</sup>.

Another preacher of the same century with similar ideas to Luther in France and Switzerland was John Calvin (1509-1564). Calvin recognized marriage as long as it did not interfere with the serving of God. According to the philosophy of Calvin, there is nothing sacred in marriage. Marriage is only an institution equal to agriculture, architecture, work of weavers or sewers. Calvin condemned those who considered marriage as Sacrament. People and secular authorities liked the ideas preached by Luther, Calvin and other reformers, because these ideas rebelled against the Church as being almighty. The State was fuelled against the Church and was encouraged to take over the management and control of all institutions<sup>153</sup>.

From the 16 th century the Catholic Church started gradually losing its position as a result of various ideas and theories being spread as well as the disagreements between State and Church. The State started to actively intervene in the conclusion of marriage. In parts of mainland Europe, the Church lost its position after the Reform of Protestants. However, the changes were minor because the integration of the State into the process of marriage conclusion was very slow. The secular authority simply copied the existing rules of Canon Law. Conclusion of a civil marriage became obligatory only after the French Revolution. Royal Courts took control of marriages validation and cancellation from the Church<sup>154</sup>.

On 1 April 1580, the first civil marriage was validated by Calvinists in the Netherlands. Registration of civil marriage was introduced in reference to the contradictions of the State, Church and diversity of confession. Civil marriage was

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<sup>151</sup> BRIZGYS, *supra* note 150, p. 3.

<sup>152</sup> *Id.*, pp. 46-52.

<sup>153</sup> *Id.*, p. 44.

<sup>154</sup> HITCHCOCK, J., *History of the Catholic Church: From the Apostolic Age to the Third Millennium*, San Francisco: Ignatius Press, 2012, pp. 245-248.

intended for people straying from the Catholic Church belief or for persons not belonging to the Catholic Church<sup>155</sup>. According to the new law, people wishing to conclude marriage could choose between a Calvinist priest and a civil officer. This law insulted the Catholics, as a marriage concluded in a church was not considered valid.

In the course of time, marriage managed by civil laws prevailed. Civil marriages increased due to the change in relationship of the State and Church. In Catholic countries civil marriage was introduced. Marriage, managed according to the state laws and concluded civilly without participation of Church, was considered as “civil” marriage.

In England non-formal marriages were concluded until a Decree was introduced by Lord Hardwick in 1753. This Decree like the ~~Decretum Tametsi~~ ~~Decree of Tammets~~ prohibited secret marriages by making church ceremony obligatory. Civil marriage was introduced by the Marriage Act in 1836<sup>156</sup>.

Formatuotas: Perbraukimas

In France, the option of civil marriage was introduced in 1787. This civil marriage only applied to Protestants, because from 18 October 1685 Protestants were prohibited to engage in marriage by Protestant priests. Protestant priests were ordered to leave France. Protestant could choose to marry through the Catholic Church or not engage in marriage at all. Despite the cruel persecution, Protestants secretly concluded their marriages with their priests who were hiding in the forests or lived without marriage. Due to this reason, King Louis XVI introduced optional civil marriage for Protestants in 1787, i.e. Protestants could choose to conclude marriage in a Catholic Church or in state institutions<sup>157</sup>.

In France, the Catholic Church also managed all marriage matters for Catholics and maintained civil registration of marriages until the Great Revolution. The French Revolution with its slogans of Freedom, Equality, Brotherhood and its determination to reform the entire political and social system could not leave the issue of marriage untouched. On the 14<sup>th</sup> of September 1791 marriage was declared by the National Assembly as a civil contract (*Contract civil*), and on the 20<sup>th</sup> of September 1792 the obligatory civil marriage Law was adopted. Hence, civil marriage became obligatory. The

<sup>155</sup> MEILIUS, K., “Šeimos Privatizavimas – Pavojus Jos Stabilumui”, *SOTER*, 2003 (38), 21-22. [MEILIUS, K., “Family Privatisation is a Danger for Stability of a Family”, *SOTER*, 2003 (38)].

<sup>156</sup> *A Brief History of Marriage Laws*, <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>, (last visited October 14, 2013).

<sup>157</sup> PURĖNIENĖ, L., *Jungtuvės ir Išsiskyrimai*, Kaunas: Vytauto Didžiojo Universitetas, 1932, p. 67. [PURĖNIENĖ, L., *Marriages and Divorces*, Kaunas: Vytautas Magnus University, 1932].

divorce law developed quickly as a result of the civil law development<sup>158</sup>.

In Germany, civil marriage was introduced in 1875. The Civil Code came in force in 1900 (*Bürgerliches Gesetzbuch, BGB*) and also included obligatory civil marriage. Germany did not and still does not prohibit the conclusion of marriage in a church or any other religious institution in addition to civil marriage. However, a strict requirement applies; civil marriage must precede religious matrimonial ceremonies. According to the German Penal Code, priests who performed matrimonial ceremonies of spouses without civil marriage documentation could be fined 300 marks or face imprisonment (maximal duration of imprisonment - three months)<sup>159</sup>.

In Switzerland, civil marriage first was commenced on the 1<sup>st</sup> of January 1876. The law was amended in 1907. However civil marriage was left as obligatory. Turkey adopted and implemented the requirements of the Swiss Civil Code on the 4<sup>th</sup> of October 1926. Hence, civil marriage and divorce became obligatory. Hungary introduced obligatory civil marriages and divorces by adopting a Law on the 9<sup>th</sup> of December 1894. This law became effective on the 1<sup>st</sup> of October 1895<sup>160</sup>.

In Spain, the Catholic Church had the highest power until the Revolution in 1931, therefore civil marriages and divorces were strictly prohibited. According to the law adopted from 1889 until the beginning of Revolution in 1931, all Catholics were only allowed to marry in a church. Civil marriages concluded by Catholics in foreign countries were not considered valid. Even in cases, when one of the spouses was Catholic and other was not Catholic, the spouses were only allowed to marry through the Catholic Church. Civil marriages were only for non-Catholics. Divorce was prohibited to all citizens of Spain irrespective of their religion. After the Revolution of 1931 and dethronement of King Alfonso XIII, the Constituent Public Assembly made an amendment to the Spanish Constitution legalizing divorce<sup>161</sup>.

In Lithuania, marriage was considered as a civil contract until 1386, i.e. until the arrival of Christianity. After the coming of Christianity, the Church gradually took over all matrimonial matters by declaring marriage as Sacrament and prohibiting divorce. Only religious marriages were acknowledged in the Lithuanian Statutes (1529, 1566 and

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<sup>158</sup> PURĖNIENĖ, *supra* note 157, pp. 68–70.

<sup>159</sup> *Id.*, p. 73.

<sup>160</sup> *Id.*, p. 84.

<sup>161</sup> BRIZGYS, *supra* note 150, pp. 4–7.

1588)<sup>162</sup>. According to the First Statute of Lithuania, marriage was considered valid only if concluded in the presence of clerics of the relevant confession, as well as by following the religious ceremonies of that church. The development of civil marriage was similar to the development of the civil registry acts, i.e. with the development of acts on marriage, death and birth. At first, civil marriage was applied for non believers' or for those with a religious belief not approved by the State<sup>163</sup>.

When Lithuania became a part of the Russian Empire, principles of marriage law, adopted in Russia during the 18 th century were followed. Only church marriage, i.e. marriage concluded by following a religious ceremony, was considered valid<sup>164</sup>. French law (*code civil*), was adopted in Southern Lithuania around Suvalkija in 1807. The law on civil marriage and divorce came together with the French Law. However, the Marriage Statute adopted in 1836 abolished civil weddings and divorces in Suvalkija and only a religious marriage was declared to be valid. According to that Statute, marriage between Catholics could be terminated only by the death of one of the spouses. This Statute prohibited the divorce of Catholics. The Lithuanian Statute was in effect in the former Province of Kaunas and Palanga until 1840. The Statute was replaced by the provisions of Part I, Book X of the Civil Code in the Province of Kaunas. Civil laws of the Baltic States became effective from 1864 in Palanga. After the First World War, when Lithuania became free of the clutches of the Russian Tsar and became an independent democratic republic, it became obvious that the tsarist Russian laws had to be replaced. On 8 April 1924, the Minister for Home Affairs issued a circular better note, according to which, the municipalities were obliged to register marriages, births and deaths for people not wishing these events to be registered by clerics in confessional rituals<sup>165</sup>.

In 1918 – 1919, the Soviet government adopted new Civil Code laws, including the norms of the Marriage code. Civil marriage became obligatory. After re-establishing its independence (1918) of Soviet rule, Lithuania did not adopt its own Civil Code; instead, four systems of civil law existed at that time and the jurisdiction was based on geographical regions. In 1940, Soviet Lithuania adopted the Marriage, Family and Custody

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<sup>162</sup> ANDRIULIS, V., *Lietuvos Statutų (1529, 1566, 1588) Šeimos Teisė*, Vilnius: Teisinės Informacijos Centras 2003, p. 41. [ANDRIULIS, V., *Lithuanian Statutes' (1529, 1566, 1588) Family Law*, Vilnius: The centre of Juridical Information, 2003].

<sup>163</sup> ANDRIULIS, V. and MAKSIMAITIS, M., *Lietuvos Teisės Istorija*, Vilnius: Justitia, 2002, p. 400. [ANDRIULIS, V. and MAKSIMAITIS, M., *History of Lithuanian Law*, Vilnius: Justitia, 2002].

<sup>164</sup> *Id.*

<sup>165</sup> DIČIUS, *supra* note 122, pp. 14-16.



Code (1926) of the Russian Federation with all its amendments and supplements. This code was replaced by a new Marriage and Family Code on 1 January 1970<sup>166</sup>. This Code and its amendments were valid until 1 January 2001. According to the mentioned Code, only the State had the right to regulate marriage and family relations. On 1 July 2001 a new Civil Code was introduced. This code included issues and conditions related to marriage conclusion.

The history of marriage laws in Europe has been characterized by a struggle between religious organizations and the State to control the institution. In Roman law, marriage was considered to be largely a private matter, regulated by custom more than law. Marriage did have legal consequences: it was indirectly significant when the law “had to deal with problems involving membership of the ‘houses’ of which the body politic was composed, with succession on death, or with allocation of responsibility for civil wrongs”<sup>167</sup>. But the formation and dissolution of marriage was governed primarily by custom.

So, in conclusion, the history of marriage is a part of the history of common culture. The definition of marriage and forms of marriage conclusion has changed over time, subject to culture and depending on relations between Church and State. Currently, the marriage institution is also subject to special attention and inevitable changes.

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<sup>166</sup> ANDRIULIS, *supra* note 163, pp. 95-98.

<sup>167</sup> GLENDON, M., *State, Law and Family*, Chicago: Chicago University Press, 1989, p. 21.

## V. APPROACH OF THE MODERN STATE AND THE CHURCH TO THE INSTITUTION OF MARRIAGE

### A. APPROACH OF THE MODERN STATE TO THE INSTITUTION OF MARRIAGE

The State considers marriage a contractual relationship between two parties that vests these parties with a new legal status<sup>168</sup>. Unlike other contracts, however, the new status, created by the marriage contract, cannot be terminated at will by the parties, but only as provided by the law of the state, thereby making the State a “third party” to any marriage.

In the modern world, the marriage has an increasingly complicated meaning. Definition of family may include transgender parents and bisexuals married to members of the opposite sex or living with same-sex partners. In some states same-sex couples possess or pursue the right to be married. Certainly, a legal recognition of such marriage does not create or eliminate the agreements that people make between themselves, nevertheless these couples ask for legal recognition<sup>169</sup>.

Besides, high divorce rates mean that many children are not raised in a traditional family unit<sup>170</sup>. Here again, the fact that the parents are not married does not mean that they are not a family, but it changes the way that families are arranged<sup>171</sup>.

While text writers and decisions of courts often define marriage as a civil contract, generally indicating that it must be founded upon the agreement of the parties and does not require any religious ceremony for its solemnization, it is, nevertheless, something more than a mere contract. Of course, the consent of the parties is essential to existence of marriage, but when the contract to marry is executed, the parties cannot change the relation created between them. Other contracts can be modified, restricted,

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<sup>168</sup> The modern law of marriage is based on the premise that men and women are independent individuals.

<sup>169</sup> CAHILL, S. and TOBIAS, S., *Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families*, Michigan: the University of Michigan Press, 2007, p. 6.

<sup>170</sup> CATTON, W., “Family Divorce Heritage and Its Intergenerational Transmission: Toward a System Level Perspective“, *Sociological Perspectives*, 1988 (31), 398-419; EVANS, J., “Effects of Parental Divorce among College Undergraduates“, *Journal of Divorce and Remarriage*, 1997 (26), 69-88; GLENN, N. and KRAMER, K., “The Marriages and Divorces“, *Journal of Marriage and the Family*, 1987 (49), 811-825.

<sup>171</sup> STETS, J., “Cohabiting and Marital Aggression: The Role of Social Isolation“, *Journal of Marriage and the Family*, 1991 (53), 669-680.

enlarged, or entirely terminated by the same consent of the parties. This is not the case with marriage. The relation once formed the law steps in and holds the parties to various obligations and liabilities<sup>172</sup>.

Most modern countries and their legal systems are secular<sup>173</sup> i.e. do not confess any religion but their citizens have the right to confess faiths, to be guided by them and to belong to religious communities<sup>174</sup>. All faiths acknowledge marriage to be a religious matter, a subject of subordination to their spiritual law. The matrimonial rights and duties in the religious view are binding not only in the external sphere of public life but in the internal sphere of one's conscience. Democratic systems of modern civilization recognize the right of their religious citizens to worship and respect their obligations to the confessional law. However, these systems differ in the aspect of respect vis-à-vis the individuals' religious feelings regarding religious marriage. Confessional marriages are recognized by civil law in some countries<sup>175</sup>; in others<sup>176</sup> - the church marriage is not recognized as it has no legal power.

## B. APPROACH OF THE MODERN CHURCH TO THE INSTITUTION OF MARRIAGE

Today the Church denies both the social dimension of marriage and its character as a contract; but it does insist that the heart of marriage lies in its being an inter-personal sexual relationship of life-giving love, and one, which is therefore permanent and exclusive. It is this relationship, which is given the legal status of a contract and institutionalized in various other ways; but it is neither the contractual character nor the institutional factors, which tell us about the reality of marriage<sup>177</sup>.

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<sup>172</sup> FUNARO, J., *Legislative Guide to Marriage Law*, Iowa: Iowa University Press, 1991, p. 3.

<sup>173</sup> A secular state is a concept of secularism, whereby a state or country purports to be officially neutral in matters of religion, supporting neither religion nor irreligion. A secular state also claims to treat all its citizens equally regardless of religion, and claims to avoid preferential treatment for a citizen from a particular religion/nonreligion over other religions/nonreligion. However, not all legally secular states are completely secular in practice.

<sup>174</sup> MADELEY, *supra* note, 86, p. 15.

<sup>175</sup> As it was pointed in the introduction in seventeen EU countries church marriage is recognized by State: in Lithuania, in Latvia, in Estonia, in Spain, in Italy, in Cyprus, in Greece, in Denmark, in Sweden, in Poland, in the United Kingdom, in Ireland, in Portugal, in Malta, in Finland, in Slovakia, in the Czech Republic.

<sup>176</sup> For example, in Belgium, in France, in Germany, in the Netherlands, in Hungary and in Bulgaria.

<sup>177</sup> KELLY, K., *Divorce and Second Marriage—Facing the Challenge*, London: Sheed & Ward 1997, p. 12.

The modern Church provides amendments to Canon law<sup>178</sup>, which attempt to look globally at marriage and to cover various personal and social aspects. The Church understands that action of legal regulations should contribute to fostering of such conditions, under which serious attention is always focused on human values of marriage.

General opinion, existing in the jurisprudence of the modern State, states that in its own sphere the State is the supreme body establishing the intercommunion of its citizens. The Church deals with spiritual matters - human relations to God. From the point of view of the law, marriage is a contract, whereas from the point of view of the Catholic Church - it is both a contract and a sacrament<sup>179</sup>.

“Marriage” is an objective institution and as an individualized reality it is a dynamic process, which develops and changes, and can go through periods of growth or deterioration<sup>180</sup>.

Legislation of the modern State has made attempts to negate Canon marriages and to recognize civil marriages only<sup>181</sup>.

A comparison of the ancient State and the modern State approach to the marriage institution distinguishes the following peculiarities:

1. The modern State has separated itself from the Church, and marriage is considered a civil matter only;
2. The modern State has legitimized divorce;
3. The approach of the modern State to marriage institution has been modernized: social activities (policy) the State takes more functions that previously were peculiar to family. Thus, in the State’s opinion the significance of the marriage institution decreases.

Consideration of the requests of the 2nd Vatican Council and the new marriage celebration rites brings the expectation of new liturgical and juridical norms for the nations that have recently accepted Evangelic. These preparations, made under the guidance of the Catholic Church superiors, are an attempt to combine the reality of the Christian marriage

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<sup>178</sup> Under 1983 Canon code understanding of marriage appears in a broad religious context through the doctrine of the covenant, the highly juridical language of the contract.

<sup>179</sup> Marriage has not always been listed among the sacraments of the Catholic Church. The early Scholastics defined sacrament as both a sign and a cause of grace and, since they looked upon marriage as a sign but not a cause of grace, they did not list it among the sacraments. Marriage could not be a cause of grace, run their argument, because it involved sexual intercourse which Augustine had taught was always sinful, even between a husband and wife, except in the case when it was for the procreation of a child.

<sup>180</sup> HILL, N., *Christian Marriage and Family*, Collegeville: The Liturgical Press, 1993, p. 5.

<sup>181</sup> MEILIUS, *supra* note, 155, p. 22.

and the authentic traditional values of these nations<sup>182</sup>.

In contemporary Western Europe two different approaches to the agreement of marriage prevail: some countries, such as Belgium, France, Germany, the Netherlands and Switzerland, consider the civil marriage ceremony compulsory, and it is the one to cause legal consequences. These countries have completely separated the role of the Church and the State in the conclusion of marriage.

In other European countries, such as Denmark, the United Kingdom, Ireland, Greece, Italy, Spain, Portugal, Sweden, Poland and Lithuania, the individuals entering into marriage have the right and are free to choose a civil or church ceremony, both of these secure the legal consequences of marriage.

Although the Church does not recognize civil marriage, it shows increasing tolerance to the civil marriage of Catholics, understands and sees into the problems the spouses face if they marry through the church only. The State approach to the marriage institution is also undergoing rapid changes: greater regard to the needs and requests of engaged couples results in restructurization of marriage institution. The State recognizes church marriages, refuses some of the requirements for the conclusion of valid marriage and allows homosexual marriages. However, such radical steps of the State, as legitimization of homosexual marriage, provoke negative reaction from some citizens and the Church.

Therefore the modern Church is clearly in favour of marriage and family. Marriage and family are no obsolete models of pre-modern times, nor are they solutions to embarrassing situations, nor can they be swept away as a failed development that has to be overcome. In marriage, the 'yes' two people say to each other becomes the principle based on partnership, trust and openness on which they live for God. This being so, marriage is the place where people can develop themselves as persons within a relationship. Furthermore it is the place where new life does not only emerge from but where it can also develop itself in a shelter of security. This is why marriage and family correspond to each other.

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<sup>182</sup> ÖRSY, *supra* note 99, p. 47.

## C. THE ATTITUDE OF THE CATHOLIC CHURCH TOWARDS THE INSTITUTION OF MARRIAGE

Marriage is one of the oldest social institutions, existing in one form or other in all cultures. As a human institution, it has existed in several forms; polygamist (including polygamy and polyandry), as well as the more common monogamist model. It has undergone significant changes throughout the centuries<sup>183</sup>.

Under the Christian teaching marriage is a place where the two sexes accept each other as differently gendered and learn and grow through it. Marriage is a lifelong, monogamous relationship between a man and a woman<sup>184</sup>.

Marriage and family are not only a laic institution, but also a religious-moral institution, (the divine arrangement, the sacred sacrament, the vocation of life). As far as history dates back, the State and Church have always been inseparable concepts both in the philosophical, legal and practical sense. Of course, such an important institution as marriage and family had to have religious features and have been controlled by the Church<sup>185</sup>. Family is the fortress of religion and morality, therefore the Church is related to the family institution with the deepest historic and cultural traditions, and this relationship lifts it up to the highest rank of sacraments. It is reflected in canon law. Without going deeper into the religious aspects, it can be stated that the modern Catholic canon law acknowledges the competency of the civil government in the consequences of civil marriage. The Church acknowledges the following features of marriage: unity, indissoluble union, monogamy, i.e. the marriage of a man and a woman; heterosexuality, i.e. the spouses must be of different sexes. The aims of marriage according to canon law<sup>186</sup> are mutual life, the goodness of spouses, the bearing of children and their education. These are obligatory conditions, therefore if one of them is missing or if one of the spouses consciously does not acknowledge one of the main features of marriage, the Church does not acknowledge the marital agreement and considers the marriage invalid.

Marriage is regarded as a twofold action: firstly as a wedding connection and

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<sup>183</sup> HILL, *supra* note, 180, p. 5.

<sup>184</sup> KELLER, T., *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God*, London: Penguin Books, 2011, p. 16.

<sup>185</sup> BLANKENHORN, D., *The Future of Marriage*, New York: Encounter books, 2007, pp. 14-16.

<sup>186</sup> MCKENNA, K., *Concise Guide to Canon Law: A Practical Handbook for Pastoral Ministers*, Notre Dame: Ave Maria Press, 2000, p. 65.

secondly as an action of making a family between a man and a woman. These two concepts have different words in different languages. These concepts are different: the wedding is considered an action starting the embryo of the family (*Trauung, Eheschliessung, бракосочетание, la célébration du mariage*). The consequence of this action, or the wedding in a broader sense, is called marriage (*брак, брачный союз, matromonium, le mariage*). Marriage is the agreement between a man and a woman for the constant alliance of their life and rights<sup>187</sup>.

According to the Church marriage is called a covenant, because, like all other types of covenant, marriage is an agreement between two parties that contained stipulations and sanctions. A marriage covenant, like any other covenant, includes details of payment, the agreement to stipulations by two parties, a set of penalties for the party who did not keep these stipulations, and a legally binding witnessed ceremony or document that recorded all matters<sup>188</sup>.

The attitude of the Church towards marriage is twofold: realistic and idealistic. Following the realistic view, marriage is considered the issue of this world and according to the idealistic one, marriage is regarded as a supernatural phenomenon belonging not only to spouses themselves, but is also an issue of the State and Church<sup>189</sup>. Marriage, as taught by the Church, is the issue of the human heart and feelings.

Marriage is considered by the Church as a supernatural phenomenon. The laws of the Church indicate “marriages of the baptized are a sacrament”, which brings supernatural value for the marriage. The sacrament “happens” when a couple proclaims their will to marry<sup>190</sup>.

What a theology of Christian marriage most needs is an account which sets forth the kind of human intentions, actions, and affections, sometimes thought to be reserved for God alone, can be directed toward one’s marital partner<sup>191</sup>.

“Christian marriage is a prism through which God’s love shines into many areas of human life. Through the love of wife and husband, woman and man, through the loving

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<sup>187</sup> KAVOLIS, M., *Bažnytinės Tikybiniai Mišriosios ir Civilinės Moterystės Juridinė Padėtis Lietuvoje*, Kaunas: Vytis, 1930. [KAVOLIS, M., *Legal Position of Mixed Matrimony in Lithuania*, Kaunas: Vytis, 1930, p. 24.

<sup>188</sup> INSTONE-BREWER, D., *Divorce and Remarriage in the Bible: The Social and Literary Context*, Cambridge: William B. Eerdmans Publishing Company, 2002, p. 4.

<sup>189</sup> KAVOLIS, *supra* note 187, p. 26.

<sup>190</sup> TIHAMERIS, T., *Katalikų Santuoka ir Šeima*, Alytus: Alka, 1994, p. 14-15. [TIHAMERIS, T., *The Marriage of Catholics*, Alytus: Alka, 1994].

<sup>191</sup> THOMAS, *supra* note 129, p. 22.

words pronounced in public in formal ceremony...<sup>192</sup>

Canon law defines marriage in the same way: “the marital agreement by which a man and a woman make their mutual union for the rest of their lives that is in its nature meant for the goodness of the spouses and the bearing and education of children”<sup>193</sup>. The marriage *in fieri* is clearly distinguished, i.e. the union and marriage *in facto*, i.e. the constant way of life. Marriage is clearly defined as an agreement of the wedded<sup>194</sup>. In general, the Church is stricter than the State, indicating and requiring the married couple to clearly realize the marital agreement and the fullness of its content, i.e. defines the object of marriage for the spouses. If the spouses do not form a union for the rest of their lives or refuse to bear children or do not acknowledge the marital fidelity, their marital agreement is regarded as not sufficient, i.e. they agreed upon something not considered as marriage by the canon law.

According to the Catholic Church, the marital community is based on the relationship of spouses as well as the mutual agreement. Marriage and family are meant for the well-being of spouses, the bearing of children and their education<sup>195</sup>.

As mentioned before the internal and essential ground for marriage is a strong union of a man and a woman based on love<sup>196</sup>. Canon law (1983) defines marriage as a union uniting a man and a woman with special bonds for the rest of their life, is meant for the goodness of the spouses and to raise and educate children. The aim of this unity is to retain the goodness of the spouses, not to violate the individual autonomy and dignity, respect the subjectivity of one’s own and one’s partner<sup>197</sup>.

The Church also clearly objects to various family planning programmes violating the rights and dignity of a man and a woman. The laws of the Church underline the responsibility of parents in planning the size of their family. The spouses have an indefeasible right to decide when to have children and how many children they want to

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<sup>192</sup> THOMAS, *supra* note 129, p. 28.

<sup>193</sup> CORIDEN, J., *Code of Canon Law: A Text and Commentary*, New York: Paulist Press, 1986, p. 95.

<sup>194</sup> According to Can 1057 § 1. The act by which the marriage is concluded is a legal agreement of the parties expressed between the legally able persons; no other human will can serve as or contribute to this action; § The marital agreement is an act of will by which a man and a woman give into one another irrevocably by any agreement in order to conclude a marriage.

<sup>195</sup> MEILIUS, *supra* note, 155, p. 21.

<sup>196</sup> WOJTYLA, K., *Meilė ir Atsakomybė*, Vilnius: Aidai, 1994, pp. 5-8. [WOJTYLA, K., *Love and Responsibility*, Vilnius: Aidai, 1994].

<sup>197</sup> PLUŽEKAS, Z., *Pastoracijos Psichologija*, Vilnius: Amžius, 1996, p. 320. [PLUZEK, Z., *Psychology of Pastoration*, Vilnius: Amžius, 1996.



have<sup>198</sup>.

Following Canon law, the marriage is not only a natural agreement of the wedded, but it also has the sign of sanctity: it is a sacrament: "among the baptized there is no valid marital agreement which is not a sacrament at the same time"<sup>199</sup>. Canon law specialist Malakauskas states the marriage of Christians *in fieri* is an agreement and also a sacrament<sup>200</sup>.

*Codex Juris Canonici* does not have a precisely determined definition of marriage. The definition of marriage of the Roman law is regarded as valid by the Church: I. 1. D. 23,2: "*coniunctio maris et feminae, consortium omnis vitae, divini et humani iuris communicato*" and I I 1,9: "*nuptiae sive matromonium est viri et mulieris (legitima) coniunctio, individuum vitae consuetudinem continens*". The Catholic Church made the following conclusions out of this definition: marriage is monogamist, inseparable, and, if established between Christians, is sacramental.

According to the concept of a marriage based on the decisions of the Second Vatican Council, the main features of marriage are considered its unity and indissolubility<sup>201</sup>. These attitudes are transferred into and consolidated in the Canon law Code (Can. 1056<sup>202</sup>). Unity is the union of a man and a woman. It not only rejects the possibility of a polygamic union, but also requires the marital fidelity. Dissolubility follows from means the marital bond lasting for the rest of their life and after the death of one of them. At the same time the goodness of the offspring and the spouses is implicated as well as the declaration of the agreement for marriage as an act by which a motivated decision is made determining the future. The future has a special meaning here as it embodies the object of the marital agreement<sup>203</sup>.

The Catholic Church strongly declares a valid marriage is indissoluble and can

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<sup>198</sup> ŽIŪKAS, V., *Lithuanian family*, Vilnius: Institute of Philosophy and Sociology, 1994, pp. 16-17.

<sup>199</sup> CORIDEN, *supra* note 193, at 1055 can.

<sup>200</sup> MALAKAUSKIS, P., *Moterystės Teisės*, Kaunas: Vytauto Didžiojo Universitetas, 1932, p. 5. [MALAKAUSKIS, P., *Rights of Matrimony*, Kaunas: Vytautas Magnus University, 1932].

<sup>201</sup> The indissolubility of marriage is revealed in the Pauline privilege (*Privilegium Paulinum*). In Paul's epistle it states: "To the married I give charge, not I but the Lord, that the wife should not separate from her husband ... and that the husband should not divorce his wife. To the rest I say, not the Lord, ... But if the unbelieving partner desires to separate, let it be so; in such a case the brother or sister is not bound. For God has called us to peace." (1 Corinthians 7:10-15 RSV).

<sup>202</sup> The essential properties of marriage are unity and indissolubility; in christian marriage they acquire a distinctive firmness by reason of the sacrament.

<sup>203</sup> MALAKAUSKIS, *supra* note 200, p. 321.

not be cancelled in the eyes of God and society<sup>204</sup>. Therefore the Church prohibits the divorce of the spouses.

However, history shows, the primary attitude of the Church towards Christian divorce and second marriage has not been uniform. The famous Fathers of Church Basil and Cyril allow the second marriage for the goodness of souls if there is a proportional reason<sup>205</sup>. The early community of Christians did not encourage divorce or second marriage by any means. Regarding divorce as a tragedy, the Church still was not ready to forgive its member for a tattered marriage, if he repents for his sin. A Christian entering into his/her second marriage was not considered to be condemned by or excommunicated from the Church.

At all times the Church has declared the indissolubility of marriage as a direct demand of God and the obvious principle of natural law<sup>206</sup>. Until the 12th century the Church had viewed the indissolubility of marriage as the moral requirement entangling it with disciplinary laws. Later canonists and theologians started treating the indissolubility of marriage as impossibility rather than a ban: Christian marriage can not be dissolved. A matrimonial bond appearing in the valid sacramental marriage was started to be considered as an anthropological reality rather than as a moral obligation of Christians. At approximately 1200 A.D, the indissolubility of marriage was no longer a Christian ideal to be strived for by spouses in western society: it became “the law”, binding all Catholics. In 1917, Canon law Code (can. 2356) declared excommunication and personal interdiction to anybody attempting a second marriage, despite a Bishop’s warning, and who remains in “impermissible union”.

In accordance with church statistics of two decades ago, 80.46 percent of the Lithuanian population confesses to the Catholic religion (Evangelicals - 9.54 percent, Orthodoxies - 2.54 percent)<sup>207</sup>. More than 2/3 of marriages are consecrated by the Church, and therefore the role of the Church in this process is very important. It is worth noticing in Catholic Lithuania the number of recorded divorces is significantly higher than in countries where the Catholic tradition has not been interrupted. For example, the number of divorces per one hundred marriages is 19 in Poland, 13 in Italy, 16 in Spain and unfortunately, 55 in

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<sup>204</sup> CORIDEN, *supra* note 193, p. 1141.

<sup>205</sup> *Id.*, p. 80.

<sup>206</sup> TWOMEY, G., *When Catholics Marry Again*, Minneapolis: Private Publishing House, 1982, p. 36.

<sup>207</sup> VAITIEKAITIS, A., *Bažnyčios Praeitis*, Kaunas: Šviesa, 1992, p. 173. [VAITIEKAITIS, A., *The Past of the Church*, Kaunas, Šviesa, 1992].

Lithuania<sup>208</sup>.

While the Church continues to recognize the indissolubility of marriage, spouses find it too difficult to live together for different reasons. In such cases, the Church allows the spouses to be separated physically and not to live together. It states that the spouses remain as husband and wife before God; they cannot enter into a new marriage. In such complicated situations, reconciliation, if possible, would be the best solution. The Christian community is encouraged to help such people to live a Christian life in their situation and to remain faithful to their irrevocable matrimonial bond<sup>209</sup>.

In summary, the essence of Christian marriage consists of:

- Monogamy, i.e. marriage between one man to one woman;
- Heterosexuality: it consists of a man and a woman;
- Public recognition, the separation from parents is made public and announced to the community;
- Embodiment of sexual union: “one body”;
- Non-recognition by the church of marriage that is attempted to be concluded by a sexually impotent individual or when sexual life is rejected;
- A church marriage lasts for life.

For the validity of canon marriage, the consent of spouses has to be stated in an established legal form and between legally capable persons. Validity of the matrimonial consent is understood not only as an outcome of a spouse’s natural capability (such as sufficient power of reasoning) but also their legal capability. This means, individuals entering into marriage have to be sufficiently mature mentally and there should be no obstacles disrupting the marriage. Matrimonial consent has to be expressed with free will, without fraud, violence, reservations or fear<sup>210</sup>.

The priest participating in the ceremony of marriage, on behalf of the Church, accepts the consent of individuals entering into marriage and bestows the consecration of the Church on the marrying couple. Therefore, the Church usually requests its members to marry in the church. Several reasons can serve as an explanation for the marriage procedure:

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<sup>208</sup> *Moterys ir Vyrų Lietuvoje*, Vilnius: Statistikos Departamentas, 1999, p. 117. [*Women and Men in Lithuania*, Vilnius: Department of Statistics, 1999].

<sup>209</sup> JOHN PAUL II, *Apostolic Adoration*, Lumen: Liturgical Press, 1994, p. 83.

<sup>210</sup> VAIČEKONIS, P., “Marriage Consent under the Canon Law”, *Soter*, 2003 (38), 28-31.

- Sacramental marriage is a liturgical act, and therefore it is to be performed during a public church liturgy;
- Marriage introduces into the church estate, creates rights and obligations in relation to spouses and their children in the church;
- Publicity of agreement protects the concluded marriage<sup>211</sup>.

The non-observance of all these regulations prescribed for the conclusion of lawful marriage however does not interfere with the conclusion of valid marriage. In addition, the Church establishes the so-called disrupting obstacles, serving as causes for invalidity of marriage. Canon law is favourable to marriage, and therefore before obstacles are proven in court, marriage is deemed valid. In the Church, matrimonial obstacles are firstly related to the very act of the wedding conclusion, i.e. the act of matrimonial consent. It cannot be given by juveniles and those who are incapable of full self-determination at the time of the marriage agreement.

#### D. THE CIVIL LAW APPROACH TO THE MARRIAGE INSTITUTION

At present in Lithuania the juridical, material, psychological and social aspects of family are to a greater extent influenced by the State legislation, Constitution, Civil Code and relevant international treaties. As a small part of the State and the nation the family fosters such moral values as a sense of responsibility, understanding and forgiveness to each other. Social life cannot even be imagined without these family functions. Family is the foundation of society and the State. The State protects and takes care of families.

As already was mentioned in the previous chapter Lithuanian Civil Code (Article 3.7) defines the concept of marriage as an institution where legal family relations are in force: “Marriage is a voluntary agreement between a man and a woman to create legal family relations executed in the procedure provided for by law. A man and a woman, who have registered their marriage in the procedure provided for in law, shall be deemed to be spouses”.

However, these relations, consisting of mutual rights and duties, are neither named nor founded, i.e. the conditions that determine these rights and duties are not defined. The Civil Code focuses on the validity of the marriage agreement, its recognition,

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<sup>211</sup> CORIDEN, *supra* note 193, at 1108-1123.

matrimonial property and the rights and duties of spouses and their children in case of divorce or any restrictions of marriage.

If Canon law considers marriage as a personal and moral matter, inevitably the State has to pay more attention to the social aspects of this institution. The State<sup>212</sup> does not have any official religion or morality, and, therefore, it must adjust and ensure the rights and interests of citizens of the most diverse religious and moral systems.

An expert in the Canon law, Dr. P. Vaičekonis<sup>213</sup> provides an interpretation of civil marriage as a matrimonial contract, signed by an official of civil power, in compliance with state legislation. It can be analyzed in two ways: as a momentary act, i.e. as a wedding (*matrimonium in fieri*), and as a regular life style, as an estate (*matrimonium in facto*).

The Lithuanian Republic law takes a slightly different approach to the marriage and family institution compared with that of the Church. The State does not recognize the indissolubility of marriage and undeniable preservation of the same qualities of marriage; it does not require spouses to keep to the engagements with the same strictness as the Church implies<sup>214</sup>.

The State and the Church have common interests in the marriage agreement and family: they aim at strengthening family relations, put effort into making families harmonious and stable, solve arising problems and provide various types of support. However, the family interests of these two institutions are slightly different. The Church is more concerned about the spiritual life of families; it encourages families to lead a moral life, to follow the commandments of God, and strengthens faith. The State looks at the family as a foundation of society and the State.

At present the State has a significantly higher power over the family institution compared to that of the Church. The State regulates family relations through civil law. The spiritual and moral education of families is left to the Church<sup>215</sup>.

The procedure of conclusion and registration of marriage as well as all other marriage and family relations in the Lithuanian Republic are regulated by Civil Code;

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<sup>212</sup> Absolute majority of states of the European culture, including Lithuania.

<sup>213</sup> VAIČEKONIS, P., *Santuokinė Teisė*, Kaunas: Vytauto Didžiojo Universitetas, 1994, pp. 36-38. [VAIČEKONIS, P., *Marriage Law*, Kaunas: Vytautas Magnus University, 1994].

<sup>214</sup> SAGATYS, *supra* note 57, pp. 182-183.

<sup>215</sup> Although the State has a greater power in the conclusion of marriage, pursuant to the Supreme Court consultation of 2004, matters pertaining to the Church marriage are left to be settled by the Church itself.

previously these matters were regulated by the outdated Marriage and Family code (MFC) and temporary regulations of the civil status acts registration. At present in Lithuania civil marriages are completely regulated by the state law that defines the rights and duties of both parties, declares when marriages are invalid and analyzes other aspects.

## ***Chapter 4***

### ***The Relationship between Church and State in a Democratic State***

#### **I. THE RELATIONSHIP BETWEEN CHURCH AND STATE IN THE LAW OF A LIBERAL STATE**

##### **A. THE RELATIONSHIP BETWEEN CHURCH AND STATE**

The State grants basic legal rights, education and social guarantees to its residents. The Church, as already mentioned, focuses on the nurturing and fostering of spiritual and moral properties of humans.

The relationship between modern culture and the legal system is, firstly, reflected in the relationship between civil and canon law most often only adapting this relationship to different religious thought. The relationship between religion and State is defined following the system of the modern State and has developed throughout the relationship of the State and Christianity; thereby through their relations' evolution<sup>216</sup>.

Religion is an integral part of natural human rights, so it is impossible to speak about freedom of consciousness without speaking about natural human rights. The problems related with the freedom of religion are defined only by investigations of separate specific cases so that afterwards the measured outcomes could be employed in forming the legally grounded state policy. One cannot fail to evaluate the role of the Church in internal national processes<sup>217</sup>.

A public opinion survey taken in last decade indicated that more than 70% of Lithuanian citizens are churchgoers and 85% of these are of Catholic faith. Based on this potential the church strives to influence state policy and legislation<sup>218</sup>.

According to the intensity of the co-operation of the State and religious organizations all states can be divided into five categories:

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<sup>216</sup> BRILIUS, V., "Sakramentinės Santuokos Pripažinimo Problemos Lietuvos Respublikos Civilinėje Teisėje", *Soter*, 2003, (38), 48-49. [BRILIUS, V., "The Recognition Problems of Sacramental Marriage in Civil Law of Lithuanian Republic", *Soter*, 2003, (38)].

<sup>217</sup> MEILIUS, K., "Bažnytinė Santuoka Civilinių ir Bažnytinių Teismų Praktoje", *Soter*, 2003, (39), 45. [MEILIUS, K., "Church Marriage in the Practice of Civil and Church Courts", *Soter*, 2003, (39)].

<sup>218</sup> *Women and Men in Lithuania*, *supra* note 208.

1. States having state religion. These are states hosting a religious dictatorship and the mentioned states are related to only one religion (e.g., states of Islam);
2. States hosting a partial separation between the state and Church. In these states, constitutions can declare the separation of the state and Church. The states of this model<sup>219</sup> do not directly relate themselves with any religion;
3. States in which state and Church are completely separated (France and the USA). In these states a clear separation of state and Church is drawn;
4. States having a national Church. In such states one state Church exists (e.g., United Kingdom, Denmark);
5. Antichurch states<sup>220</sup> (states of communist regime China and the former USSR).

The Lithuanian Constitution divides religious communities into state-recognized traditional groups and others. However, in practice there exists a classification based on a four-tier system: traditional, state-recognized, registered, and unregistered communities. The Law on Religious Communities and Associations (1995) specifies nine religious communities that have been declared as “traditional” ones and therefore can claim for governmental assistance. These traditional associations and communities receive annual financial support from the State. Other religious communities are not provided with financial assistance from the Government, yet there are no restrictions imposed on their activities or property rights.

Currently in states of the European Union, the following relationship models between the State and Church are common: national Church, complete separation and partial separation of the Church. The Republic of Lithuania, following the principle of religious tolerance which is also an important factor in ensuring human rights protection, formally belongs to the second group, as the Church is separate from the State. Article 43 of the Lithuanian Republic Constitution declares there is no state religion in Lithuania; however, it does not mean the full separation of the Church from the State. Looking from the perspective of State there are many spheres in which religious communities can and must co-operate with the State. Hence, religious organizations can obtain financial support from the State for activities aimed at assisting society and not only members of a specific religious community, e.g., establish hospitals, rehabilitation centres etc. In the first part of

<sup>219</sup> For example, Italy, Lithuania, Germany and Latvia.

<sup>220</sup> States not allowing any legitimacy.



the same Article of the Lithuanian Republic Constitution the provision “the State acknowledges traditional in Lithuania churches and religious organizations”<sup>221</sup> is proclaimed.

Both State and religion<sup>222</sup> in a liberal State acknowledge each others’ sovereignty in its sphere and they co-operate. The problem appears due to the spheres in which the institutions realize their sovereignty. Both institutions care for the welfare of people. The State cares only in a laic sphere which expresses the welfare of individuals by satisfying and creating opportunities for people to satisfy their interests, taking care of individual interests does not violate the welfare and law of others. So the State both ensures and limits the rights of its citizens. The basis of it is common wellbeing. The Church by its own means aims to co-operate with the state aiming at the wellbeing of people, but sees both the good they desire and establishes others of its own, encouraging people to strive for them. The modern State has no official ideology and does not decide what the truth is, but regulates it taking into account the things that are universally acknowledged as true and good. The State can easily change its “moral positions”, as it does not have and cannot have such a moral position and the truths followed by Church – received from the Lord - are eternal and unchanging<sup>223</sup>.

The relationship between the State and Church is consolidated in Article 14 of the Lithuanian Republic Religious Community and Society Law. Article 14 declares “religious communities, societies and centres are entitled to establish and have schools for general education and other teaching, educational and cultural institutions, development institutions for the training of clergymen, also to engage in charity, participate in charitable activity, and to establish medical and charity institutions and organizations”<sup>224</sup>. In Article 19 of the same law, religious communities can independently maintain international ties, participate in the activities of international organizations, and gain access to foreign religious articles, literature and charity. This right and opportunity is vital for most religions, as they are a composite part of international religions. So they must maintain ties of activity co-ordination and a uniform doctrine taking into consideration the canons of the confession and other legal acts.

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<sup>221</sup> BRILIUS, *supra* note 216, p. 50.

<sup>222</sup> In the case when religion displays itself through social structure able to have and having its law.

<sup>223</sup> BRILIUS, *supra* note 216, p. 50.

<sup>224</sup> Lietuvos Respublikos Religinių Bendruomenių ir Bendrijų Įstatymas, 1995, 14 V. Ž. (89 – 1985) [Law of Religious Communities of the Republic of Lithuania, 1995, 14 V. Z. (89 – 1985) (Lt.)].

According to the agreement between the Lithuanian Republic and the Holy See concerning the juridical aspects of the relations between the Catholic Church and the State Article 1: “The Lithuanian Republic and the Holy See agree that both the Catholic Church and State are independent and autonomous, each in its own sphere and following this principle closely co-operate aiming at the spiritual and material wellbeing of every person in society”,<sup>225</sup>.

Similar relationships between State and religious communities exist in other states, for example, in Austria there is an institutional separation between State and religious communities, however, at the civil level they co-operate. This co-operation is based on both the tradition of Middle European culture and the fact that the State perceives and acknowledges that religious communities in certain spheres aid in the wellbeing of society. In Austria citizens are granted the right to follow their chosen religion individually or together with others, privately or publicly<sup>226</sup>.

In Germany the petitions of religious communities are considered following these criteria:

1. A religious community must be a true religious community and not a commercial association;
2. A religious community must have a clearly defined doctrine which significantly differs from the doctrine of other religious communities;
3. The articles, number of members, property and income received from donations must ensure its long-term vitality;
4. As the State excludes religious corporations from taxes while performing their Church duties they must follow the requirements applied to non-profit organizations<sup>227</sup>.

In Spain, for a group of people to be acknowledged as a religious community and obtain the status of a legal entity, they are required to register in the Register of Religious Organizations. However, this law creates certain problems, e.g. in defining the concepts of religion and religious community<sup>228</sup>.

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<sup>225</sup> Lietuvos Respublikos ir Šventojo Sosto Sutartis „Dėl Santykių tarp Katalikų Bažnyčios ir Valstybės Teisinių Aspektų“, 2000, 1 V. Ž. 67 –2022. [Agreement Between the Republic of Lithuania and the Holy Throne Concerning the Juridical Aspects of the Relations Between the Catholic Church and the State due to Relationships Legal Aspects, 2000, 1 V. Z. 67 –2022 (Lt)].

<sup>226</sup> International Conference on State and Religious Communities Relationships: State and Religious Communities Relationships in Austria. Vilnius: Lithuanian Ministry of Justice, 2000, pp. 47-49.

<sup>227</sup> *Id.*, pp. 41-44.

<sup>228</sup> ROSSELL, J., *State-Religion Relations in Spain and Portugal*, Caceres: Extremadura University Press,

A completely different situation exists in the USA as the State does not financially support churches. Churches are strictly independent, obtaining support from private people. Moreover, the USA does not host a registration system for religious organizations, therefore churches or other religious organizations are not required to register in any state institution at the federal or local level<sup>229</sup>.

The co-operation of the State and Church means, the State ensures people have an opportunity to receive spiritual support on the entry of marriage, army, hospitals and prisons. For example, in Estonia the issuing of spiritual assistance in the army are solved jointly by the Estonian Church Council and the Ministry of Defence, in prisons by the Estonian Church Council and the Ministry of Justice<sup>230</sup>.

The relationship between State and Church is contiguous with religious specific traditions of the country, its historic experience and present situation, society demands and expectations. Issues of religion are important for all societies. If freedom of religion is secure, other human rights can be realized as well. It impossible to say any specific country has completely realized the freedom of religion.

## B. MARRIAGE BY CANON AND STATE LAW

Every State has laws establishing the requirements for valid conclusion of marriage, the wedding form and the rights and duties of the spouses. The Lithuanian State regulates marriage through its constitutional laws and the Church regulates through the church canon code.

The State acknowledges the registration of church<sup>231</sup> marriages. Article 38 of the LR Constitution declares:

“The State registers marriage, birth and death. The State acknowledges the registration of church marriage as well”. For most Lithuanian believers, the issue of entering into marriage and its legal registration is relevant, so the State, in respect of the will of the citizens, should acknowledge the Canon marriages on an equal basis. For

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2000, p. 128.

<sup>229</sup> *International Conference on State and Religious Communities Relationships*, *supra* note 210, pp. 60-63.

<sup>230</sup> *Id.*, p. 24.

<sup>231</sup> Only the traditional religious communities (including Roman Catholic, Greek Catholic, Evangelical Lutheran, Evangelical Reformed, Russian Orthodox, Old Believers, Judaist, Sunni Muslim and Karaite. Lithuanian Republic statute of religious communities and associations// State news. 1995, Art. 5.

Christians and especially Catholics a marriage is primarily a sacral and moral event, and the juridical act comes later. So in Article 13 of the Agreement “Regarding the juridical aspects of the relations between the Catholic Church and the State”, signed on May 5<sup>th</sup>, 2000, the following is established: Entering into Canon marriage creates civil consequences according to the acts of the Lithuanian Republic.

The legal aspect of marriage is either ecclesiastical or civil, depending on the place of marriage – Church or Civil Registry institution, where the ceremony takes place and the registration is done and by which authority - the marriage certificate is issued<sup>232</sup>.

Any marriage in which even one party is Catholic is governed by Canon Law (canon 1059). Any person, who is a baptized Catholic or received into the Catholic Church, and has not defected from the Church by a formal act, must marry according to canonical form (canon 1117). A Catholic may be dispensed from canonical form for a just cause (canon 1127 §2).

Civil authorities are competent to define the merely civil effects of marriage (canon 1059). Marriages that cannot be recognized according to civil law cannot be celebrated without the permission of the local ordinary (canon 1071 §1).

The Church treats the marriage institution both as a marital agreement and a sacrament, whereas the state law perceives marriage as an agreement. The comparison of civil and canon code shows that for the entering of marriage the ecclesiastical marital law has stricter requirements, which according to the canon code of 1983, are equal in all Catholic countries.

In the field of marriage requirements, there arise differences on valid entry into marriage between the church and state marital law. The marital law canon code of the church practically exceeds all valid marriage requirements of the state. A conflict between ecclesiastical and civil marital law appears when it comes to the reduction of the marital age for spouses and solemnizing the marriage of cousins<sup>233</sup>.

Confession and civil law shares the following essential statement in the explanation of the marriage concept: marriage is an absolutely free agreement of the people entering into marriage. The validity of marriage requires the appropriate public

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<sup>232</sup> MEILIUS, K. and SAGATYS, G., “Bažnyčios (Konfesijų) Nustatyta Tvarka Sudaryta Santuokų Kelias į Pripažinimą”, *Jurisprudencija*, 2002 (28). [MEILIUS, K. and SAGATYS, G., “Way of Marriages to Acknowledgement Formed in Church (Confessions) Established Manner”, *Jurisprudencija*, 2002 (28)].

<sup>233</sup> According to 1983 CIC Can. 1078 § 3, having got the Ordinary dispensa cousins can enter into valid ecclesiastical marriage, Civil law prohibits entering into such marriage.

authority to confirm the marriage<sup>234</sup>.

Church marital law is based on theological arguments, according to which the marriage of Christians as a sacrament exclusively belongs to church jurisdiction. At the same time it is the competence of the State, according to the Church, to manage the civil consequences of marriage.

The essential difference in the position of the Church and the State appears in relation to the consistency of Canon marriage; here the attitudes of the Catholic Church and State differ the most radically. In recognition, encouragement and support of the consistency of marriage civil law does not register any temporary agreement between a man and a woman that would host the rights of marriage or gain family status. According to the civil law, the spouses have the right to cancel and enter into new marriage ex-parte or by mutual assent.

So both religious communities and states have strong interests in regulating marriage that arise from the fundamental institutional, practical and conceptual identities and needs of both states and churches. Conflicts between Church and State over marriage regulation, between religious community autonomy and individual religious liberty, on one hand, and civil marriage regulation and protection of public interests, on the other, significantly threaten both institutions. Thus, conflicts between marriage regulation and religious liberties can be doubly divisive, both internally and externally discordant, for both Church and State. Such conflicts jeopardize State policies and governing integrity as well as the loyalty of some citizens.

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<sup>234</sup> BRILIUS, *supra* note 216 p. 52.

## **PART II**

### **SPOUSES' RIGHTS AND DUTIES OF THE ENGAGEMENT TO MARRY ACCORDING TO CIVIL AND CHURCH LAW**

## I. THE ENGAGEMENT INSTITUTION BASED ON THE CIVIL LAW

An engagement is part of the pre-marriage ceremony. In this work, engagement is analyzed as legal institute that provides certain rights, duties and obligations, but not following the folk customs. On the one hand, the engagement could be considered a protocol; on the other hand, it seems to be part of the marriage contract.

The institution of engagement (*sponsalia*) was known in Roman Family Law. In ancient times, a person's engagement was made without the awareness of the future spouses. Having received the agreement of both *pater familias*, persons got engaged. An engagement was made after two stipulations<sup>235</sup>. During the first stipulation the bride's *pater familias* made a vow of passing her to the groom and during the second stipulation the groom made a vow of taking her as his wife. Supposedly, in ancient times engagement could occur in a unilateral condition i.e. the bride's *pater familias* made a vow of passing her to the groom. The groom was not under a contract to take her as his wife and preserved the right of ex-parte break of the marriage<sup>236</sup>.

The first Lithuanian engagement is noted in the sourcebooks of the 16<sup>th</sup>-17<sup>th</sup> centuries. During the engagement act the wedding was negotiated in the 19<sup>th</sup> century. In Lithuania, engagement took place at the bride's house. Both of the spouses' parents, relatives and guests participated at the engagement party. The engaged couple exchanged presents and rings. After this event they were called groom and bride.

In the 19<sup>th</sup> and early 20<sup>th</sup> centuries Lithuanians made engagements and marriage agreements in the church. The rules of the engagement and marriage of the Roman Catholic Church were constituted on 18th January, 1562 by the Ecumenical Trident Meeting and during sessions 17-25 on 4th December, 1563<sup>237</sup>. These rules were not amended until the early 20<sup>th</sup> century; however, on 2nd September, 1907 under the rule of Pope, the Canon Law was complimented with the formalities of the marriage constitution<sup>238</sup>, in which marriage validation was tightened. This amendment provided the

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<sup>235</sup> Stipulation - an agreement or concession made by parties in a judicial proceeding (or by their attorneys) relating to the business before the court.

<sup>236</sup> NEKROŠIUS, I., *Romėnų Teisė*, Vilnius: Vijusta, 1996, pp. 179-180. [NEKROŠIUS, I., *Roman Law*, Vilnius: Vijusta, 1996].

<sup>237</sup> MARCINKEVIČIENĖ, D., *Vedusiųjų Visuomenė: Santuoka ir Skirtybos Lietuvoje XIX –XX Amžiuje*, Vilnius: Vaga, 1999, p. 39. [MARCINKEVIČIENĖ, D., *Society of Married: Marriage and Divorce in Lithuania in XIX –XX Centuries*, Vilnius: Vaga, 1999].

<sup>238</sup> SKVIRECKAS, J., *Nauji Įstatymai apie Sužadavinį ir Moterystę*, Kaunas: Draugija, 1908, pp. 220-222.

wedding act to be granted in writing and signed by the groom and bride. The engagement ceremony was to be held in the bride's or groom's church parish and witnessed by two or three attestors and a clergyman.

During the early 20<sup>th</sup> century the engagement institution was losing its importance. Under Soviet rule, engagement transformed into a party of both families during which wedding preparations were discussed<sup>239</sup>.

Currently, engagement is not only a nice ceremony based on long-lasting traditions, but an agreement, which indicates the rights and duties of future spouses. The engagement institution is defined by Article 3.8 of the Lithuania Republic Civil Code. The engagement can be verbal or written<sup>240</sup>.

The engagement act is also regulated by the legal rules under foreign law. For example, according to the Finnish Marriage Act<sup>241</sup>, a man and a woman, who have agreed to become married or to marry in the future marriage, are considered to be engaged. According to the same act, the engaged couple have to give written confirmation that there are no marriage impediments against Articles 7-9. Examples of impediments include being legally married to another person or keeping on the register of a partnership. According to Finnish civil law, an engaged couple is not forced to marry after the engagement.

Under Article 26 of Latvian Civil Law<sup>242</sup>, engagement is described as a “*mutual commitment to marry*”.

An engagement does not obligate a person to marry; it only gives a legal effect if the agreement is breached. If marriage is not fulfilled, both parties of the public agreement have the right to demand and receive back everything that has been given as a present to the engaged partner except for presents with a value of less than 1000 Lt, unless one of the engaged persons willing to enter into marriage dies before the wedding ceremony. Demands on returning the presents are regulated by the rules of Book 6 of the Civil Code bound to relations between people involved in unjust enrichment or gaining assets<sup>243</sup>. If one of the engaged spouses refuses to marry without a satisfactory reason, the offending spouse has to compensate the damages of breaking the engagement. It could be the

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[SKVIRECKAS, J., *New Laws about Engagement and Matrimony*, Kaunas: Draugija, 1908].

<sup>239</sup> VYŠNIAUSKAITĖ, A., *Lietuvių Šeimos Tradicijos*, Vilnius: Mintis, 1967, p. 62. [VYŠNIAUSKAITĖ, A., *Traditions of Lithuanian Family*, Vilnius: Mintis, 1967].

<sup>240</sup> Lithuanian Civil Code. Art. 3.8.

<sup>241</sup> Marriage Act, M. J. 234/1929, 1226/2001, 441 (1987) (Fin.).

<sup>242</sup> Latvian Civil Code (adopted on 24 April 1997; amended on 16 October 1997). Art. 26.

<sup>243</sup> Lithuanian Civil Code. Art. 3.9.



financial expense of arranging the marriage. If the fault of non-fulfilment lies with the other party, thus, the damage has to be compensated by the party at fault. In that case, demands on compensating the damage could be invoked as a claim with a time-bar for a year. According to the fundamental principles of civil law, damage is described as loss or defacement of property, expense incurred (direct damage) and income that would have been received if the illegal actions had not taken place. The damage is expressed in terms of money<sup>244</sup>. If the aggrieved party cannot prove the damage amount, the court can decide the value<sup>245</sup>. The damage of ceasing an engagement can inflict personal pain of being humiliated, mental suffering, discomfort, shock, emotional depression, character assassination, reduced communication, etc. Even such moral damage can also be evaluated in terms of money. The Court decides the amount of moral damage by considering the results, the living conditions, the fault of the person, the value of damage and other important circumstances in addition, and the criteria of honesty, fairness and wisdom<sup>246</sup>.

## II. THE ENGAGEMENT ACT BASED ON THE CANON LAW

According to Canon law, engagement is a promise for future marriage made between the two people involved. It is arranged according to law of the Bishops' Conference, and is based on age-old rituals and customs, and civil laws. A claim of broken vows is not brought, but an action of damages can be brought against one of the parties<sup>247</sup>. An engagement is a person's moral obligation depending on the person's conscience. A person who gives such a vow should keep it and can be free only if there is an essential reason, for example lack of loyalty, lack of fidelity, a change of circumstances, etc. According to church law, engagement differs from a free will marriage contract. Therefore, if the parties break the engagement vows without any serious reasons, they are obliged to compensate the damage and expenses of the wedding preparation<sup>248</sup>.

According to CIC, canon 1062 the engagement institution is regulated by a

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<sup>244</sup> Lithuanian Civil Code. Art. 6.249.

<sup>245</sup> *Id.*, Art. 3.11.

<sup>246</sup> *Id.*, Art. 6.250.

<sup>247</sup> CORIDEN, *supra* note 193, p. 1062.

<sup>248</sup> THATCHER, A., *Celebrating Christian Marriage*, Edinburgh: Continuum, 2001, pp. 3-5.

special law arranged by the Bishop Conference based on the customs and civil laws<sup>249</sup>.

The church law in CIC, canon 1983, stipulates marriage preparation, consequently requires both parties to attend personal family education courses to achieve holiness and assume the obligations of a new social status<sup>250</sup>.

Special attention is given to this topic in such manuals as GS (*Gaudium et spes* encyclical), 52; FC (*Familiaris Consortio*), 66; *Codex Iuris Canonici* [CIC], canon 1063; *Codex Canonum Ecclesiarum Orientalium* [CCEO], canon 783; the Roman Catholic Church Catechism 1932; and in others *Magistrerium* documents including a family's charter and the two latest *Magistrerium* documents: *Gratissimam Sane* and *Evangelium Vitae* (EV) *Encyclical*, consisting of two letters to families.

The above-mentioned articles indicate the particular attention the Church pays to the preparation for marriage. According to the philosophy of the Church, education of people on the subject of marital and family life is very important for the purpose of social welfare. The marriage Sacrament is valued by the Catholic community, and, particularly, by spouses, whose decision should not be impromptu or hasty. The importance of marriage preparations is emphasized in the Article 13, part 3 of the agreement between the Lithuanian Republic and Holy See "For the Intercourse of The Roman Catholic Church and Law Aspects of The State". According to this document, the preparation to canonical matrimony is based on Christian education of holiness, unity and the permanency of the Marriage Sacrament and on the subsequences of civil marriage, provided in the Lithuanian Republic Law<sup>251</sup>. The church law determines that a clergyman of the Church parish, must be notified about the marriage three months in advance. This period is significantly longer than the one month streak, required by civil law<sup>252</sup>. Thus, the Church pays particular attention to the marital preparation and to the Marriage Sacrament. Furthermore, the Church considers the three-month notification time as a necessity of the pastorate for the good of the engaged couple, the Catholic community and of society. For this reason, the increasing interest and timely initiative of the marriage contract and Marriage Sacrament require to prepare future spouses for matrimony and family life. According to Christian ethics<sup>253</sup>, a clergyman must provide help to churchgoers in maintaining and improving the

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<sup>249</sup> ÖRSY, *supra* note 99, pp. 66-67.

<sup>250</sup> *Id.*, p. 783.

<sup>251</sup> *Id.*, p. 13.

<sup>252</sup> Lithuanian Civil Code. Art. 3.101.

<sup>253</sup> CORIDEN, *supra* note 193, p. 1063.

marital status. This also includes rendering assistance to spouses to ensure that they keep and salvage a marriage<sup>254</sup>.

The parties participating in church marriages are invited to their church parish or another church, where the marriage is to take place, no later than after the application to the Civil Registrar. The marriage must then take place within three months of the application. A priest checks if the parties are christened, if they are confirmed, if they are churchgoers and Catholics, if they are not already legally married and if there are any impediments to the marriage. The priest informs the future spouses about the documents required, where and when the pre-marital classes take place and helps to fill in the required forms.

### III. THE RELATION BETWEEN THE CATHOLIC CHURCH AND THE STATE ATTITUDE TO THE ENGAGEMENT INSTITUTION

I have demonstrated above, the Church and the State have different attitudes towards the engagement institution. During this period, a young couple is full of love and devoted feelings and, actually, most often does not think about the juridical consequences of the engagement, neither about the regulation of property relations. In some cases the Church attitude is similar to that of engaged couples, as the Church cares about marriage preparation, spiritual matters and religious aspects. During the engagement period the state is responsible for the legal aspects of the engagement - the legal mechanism of property relations and some moral obligations to fulfill the promise of marriage are under state control. The analysis of the above-mentioned survey indicates that engaged persons are not entirely satisfied with the State regulated institute of marriage and engagement. The State does not guarantee the fulfilment of the engaged couples' needs. The State is supposed to pay more serious attention to the solution of this problem. As the State recognises church marriage, an engagement through the church should receive the same consideration under civil law. Moreover, the State should give more attention to the preparation of engaged couples for marital life.

Under the Lithuanian Civil Code, an engagement application, submitted to a Registrar, is considered a legal document, whereas, calling banns at a church parish is

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<sup>254</sup> CORIDEN, *supra* note 193, p. 1063.

invalid and can be understood only as a verbal agreement. Although, according to Article 3.8, part 3 of the Lithuanian Civil Code, an engagement agreed by calling banns at a church parish can be admitted as public<sup>255</sup>, it is against the Civil Code. The same part of the Civil Code indicates only the applications submitted to the Civil Registry to be valid. Thus, a comment of the civil law, Article 3.8, part 3 can be understood as a suggestion to complement part 3 of this Article<sup>256</sup>.

Comparison between the engagement institutions of the Civil Code and the church law (CIC, 1983) brings us to the conclusion that these two institutions are similar, as in both cases to the respective law does not oblige an engaged couple to marry. If one of the engaged persons breaks the engagement without a satisfactory reason, he/she has to compensate the damages of breaking the engagement.

#### IV. THE ENGAGEMENT INSTITUTION IN COMPARATIVE CONFLICT OF LAWS

Since engagement, both in Lithuania and other European Union countries, is one of the constituent parts of the marriage with the legal consequences, in this dissertation, I will briefly discuss the legal aspects of international engagement and the legal consequences of the conflicts that are important and relevant to the implementation of the goals of this thesis.

Conflict of laws problems concerning engagement to marry receive little attention, as especially compared to those of marriage itself.

According to Lithuanian Republic Civil Code, a promise to marry and its legal effects are governed by the law of the state of domicile of the parties to the promise<sup>257</sup>. Where the parties to the promise of marriage are domiciled in different states, the promise of marriage and its legal effects are governed by the law of the place where the promise is made, or by the law of the state of domicile of one of the parties, or by the law of the state

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<sup>255</sup> MIKELĖNAS, V., *Lietuvos Respublikos Civilinio Kodekso Komentaras, Trečioji Knyga*, Vilnius: Justitia, 2002, pp. 42-43. [MIKELĖNAS, V., *Commentary of the Lithuanian Republic Civil Code, Third Book*, Vilnius: Justitia, 2002].

<sup>256</sup> KUDINAVIČIŪTĖ – MICHAILOVIENĖ, I., “Viešas Susitarimas Įregistruoti Santuoką (Sužadėtuvės) Jo Turtinės ir Neturtinės Pasekmės”, *Jurisprudencija*, 2002 (38), 132-133. [KUDINAVIČIŪTĖ – MICHAILOVIENĖ, I., “Public Agreement to Register Marriage (Engagement) Property and Non Property Subsequences”, *Jurisprudencija*, 2002 (38)].

<sup>257</sup> Lithuanian Civil Code, Art. 1.24.

of citizenship of one of the parties, whichever law is most closely related with the dispute<sup>258</sup>.

In most countries there are no statutory provisions and few or no case laws on the subject. This is not due to any particular lack of difficult legal problems but to the obvious sociological fact that the number of contentious cases, which might give rise to litigation is comparatively small; even as a matter of law litigation involving engagement to marry is usually rare or non-existent. The conflict problems that do arise in this field, however, occasion much doubt and uncertainty. Even though the practical importance of these questions may be rather limited, consideration of these issues certainly does not lack interest from a methodological point of view<sup>259</sup>.

As regards jurisdiction, there do not seem to be any particular problems, which could not arise in other connections or any special rules prevailing for the engagement to marry<sup>260</sup>.

The way these problems are treated by national courts and lawyers are influenced by the conceptions underlying and policies pursued by the domestic rules of each legal system. There are considerable national diversities as regards the basic approach to this matter.

In certain legal systems a promise to marry made by a minor without parental consent is invalid<sup>261</sup>. Provisions of this type clearly pertain to the substantive validity of the engagement and, therefore, should be applied wherever they form part of the personal law to which the person concerned is subject<sup>262</sup>.

In principle, a distinction should be drawn between such rules which merely lay down a special condition for the liability of such minors and other cases of betrothal to marry where rules or judicial practice impose an obligation to pay compensation for breach of the engagement. In Swedish law, for instance, there is a provision pursuant to which a party who is predominantly at fault in the breach of an engagement to marry shall compensate the other party for certain losses suffered as a result of the non-performance of

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<sup>258</sup> Lithuanian Civil Code, Art. 1.24.

<sup>259</sup> PÄLSSON, L., *Marriage and Divorce in Comparative Conflict of Laws*, Leiden: Sijthoff, 1974, pp. 113-114.

<sup>260</sup> For a discussion of the problem of jurisdiction from the point of view of ENGLISH law, see Webb and Latham Brown 947-953; from an ITALIAN case, Trib. Roma 27 July 1963, *Temi rom.* 1964, p. 199.

<sup>261</sup> WEST GERMAN law, *Dolle*, *Familienrecht* I 68.

<sup>262</sup> PÄLSSON, *supra* note, 259, p. 119.

the engagement<sup>263</sup>.

The engagement to marry is often said to be a “binding” contract, but it seems to be a universal agreement that it is not susceptible to specific performance. In countries like France and Belgium, precisely because the engagement is not a binding contract, the approach in private international law has been different. In domestic law the compensation is based on tort law<sup>264</sup>. This however does not lead to an easy-to-apply rule nor to a good rule, most certainly not in the international context. In certain legal systems the effects of the engagement to marry are not exhausted with those attached to its dissolution. The engagement may also affect the status of children of the betrothed couple, and if one of the parties to the engagement dies, succession rights may accrue for the surviving party<sup>265</sup>. In some legal systems children conceived or born in the time of their parents’ engagement to be married to one another or whose parents have later become so engaged enjoy a special status approaching that of legitimacy<sup>266</sup>.

With regard to the issue of which law we must apply to cases of an international promise to marry or mixed cases: The first question arising here is whether the validity of the engagement should be treated as an independent conflict problem. In countries where municipal law does not acknowledge engagement to marry as a legal institution<sup>267</sup>, the questions of its “validity” are generally ignored at the level of conflict of laws<sup>268</sup>.

As regards the form of the engagement, observance of the requirements (if any) of the *lex loci contractus* is almost invariably held to be sufficient. Alternatively, the engagement is usually considered valid in formal respects if it has been concluded in accordance with the personal law of the parties or, if that law is not common to both of them, with the personal laws of both parties<sup>269</sup>.

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<sup>263</sup> Swedish Marriage Code 1920, ch. 1 § 3 par. 2. This as well as other provisions of Swedish law on engagement to marry was abolished from January, 1974.

<sup>264</sup> Belgian Code of Private International Law, 2004; Art., 45, <http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf>; (last visited May, 15, 2013); ERAUW, J., *Brief Description of the Draft Belgian Code of Private International Law*, in: Yearbook of Private International Law, 2002, Dordrecht, 2003, pp. 145 – 161.

<sup>265</sup> PÄLSSON, *supra* note, 259, p. 122.

<sup>266</sup> DÖLLE, H., *Familienrecht, Darstellung des Deutschen Familienrechts mit Rechtsvergleichenden Hinweisen*, Karlsruhe: Müller, 1965, p. 352. The provisions on this matter in Swedish law, however, have recently been repealed.

<sup>267</sup> Although possibly sanctions breach of it as a tort in certain circumstances.

<sup>268</sup> Even in such countries, however, insofar as their conflicts rules provide for the application of foreign law, the question of the validity of the engagement may arise where a foreign *lex causae* ignores such a requirement.

<sup>269</sup> PÄLSSON, *supra* note, 259, p. 118.

As regards the breach and which law is applicable to eventual compensation for a tortious breach I suggest: explained long ago how the qualification for use in domestic law, as a relationship sanctioned under the law of torts inevitably leads us in the wrong direction because the application of a conflicts rule related to the commission of a “tort” (usually either a choice for the law of the place of perpetration of the wrong, or – more in the general line of thinking – as a preference for the place of impact of the damage) only raises anew the question of where such a tort would be committed if a partner sends the notice or in case of termination of the relationship across a national border through the phone, or by mail or email. The logical preference seems therefore to be to construct a rule based on a potential family relationship and to project forward the national law under which the partners would have been bound for the content of their relationship. This requires further detailing of a national law applicable for the quasi-family relationship, which will not be pursued here<sup>270</sup>. The alternative approach is to regard all the issues under a relationship in which there was following from betrothal (including the breach of the promise to marry), simply flowing from “contractual” relationships and, for the eventuality of breach, to construe the potentially applicable law to the “contract”.

Indeed, as regards common law countries, in so far engagement to marry is not completely removed from the sphere of legally binding contracts; there is a tendency to deal with them in the same way as with ordinary contracts. In ordinary contracts the prevailing view, at least in common English law (not considering the generally applicable European Regulation No. 593/2008 on the law applicable to contracts, because that does not apply in the field of family relations (its Art. 1) and generally Commonwealth law, seems to be that questions of both validity and effect should be referred to one law, “the proper law of the contract”. Although this is subject to certain exceptions, particularly as regards the form of the contract, the general rule is thus, that questions of the validity of the contract are not governed by conflict rules of their own but lumped together with those relating to the discharge or performance of the contract<sup>271</sup>. Whether this also applies to contracts to marry is somewhat uncertain, the authority bearing directly on this point being

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<sup>270</sup> PÄLSSON, *supra* note, 259, p. 117; SARCEVIC, P., “Zur nichtehelichen Gemeinschaft im internationalen Privatrecht”, *Das Standesamt*, 1981, p. 182; ERAUW, J., “De verloving in het I.P.R. met enkele beschouwingen over het concubinaat” (*Engagements and de-facto-marriages in conflict of laws*), in *Rechtskundig Weekblad* 1982-83, columns 2721-2736.

<sup>271</sup> PÄLSSON, *supra* note, 259, p. 116.

limited. There is, however, one South African case where this approach was clearly adopted<sup>272</sup>.

When the engagement is broken by the death of one of the parties, certain rights of inheritance or of maintenance out of the estate accrue for the surviving party under some legal systems<sup>273</sup>. The conflict-of-laws treatment of such questions hardly is in doubt: they fall to be governed by the national law or domestic laws generally applicable in matters of succession under the conflict rules of the forum. This means that either the *lex patriae* or the *lex domicilii* of the deceased party or, with regard to immovable property, possibly the *lex rei sitae* will govern<sup>274</sup>.

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<sup>272</sup> Guggenheim v. Roenbaum, 1961 (4) S. A. 21, 30 (W.L.D.).

<sup>273</sup> For an example see the Swedish Marriage Code of 1920, ch. 1 § 6.

<sup>274</sup> PÅLSSON, *supra* note, 259, p. 143.



### **PART III**

## **VALID MARRIAGE REQUIREMENTS IN THE CONTEXT OF CANON AND STATE LAW**

## ***Chapter 1***

### ***Relationship between requirements of State and Church***

#### **I. PREAMBLE**

The law provides the rules for living in marriage and the rules for divorce<sup>275</sup>. The life of a married couple implies the right of two persons to create their future on the basis of their free will; therefore, the State or Church should only define certain limitations but not restrict their right. These boundaries or requirements for valid marriage are foreseen in the Lithuanian Republic Civil Code and the requirements of church license marriage are foreseen in the Canon Code of 1983. The Lithuanian legislation requirements for a valid marriage are not a recent development; however, scientific literature on this topic is not abundant. The current requirements for contracting a marriage are described by Prof. Dr. V. Mikelėnas and V. Adomavičius<sup>276</sup>. Church marriage is depicted in the works of Prof. Dr. K. Meilius, V. Brilius and P. Vaičekonis<sup>277</sup>.

The conditions necessary for registering a marriage or validating a marriage are considered as the requirements for contracting a marriage. The purpose of such requirements is to prevent any adverse outcomes related to the violation of these conditions. According to church law, the non-existence of impediments is the only condition for contracting a valid marriage. Some marriage conditions are positive, for example, recognition of essential features (unity and inseparability) and objectives (procreation of children). In Lithuania many couples marry in church and the state validates these marriages<sup>278</sup>. If a couple marries only in church, the requirements of Canon Law are applied and no consequences under civil law are obtained-nor, most probably envisaged. However, if a couple marries in church and in the Civil Registry Office the norms of both institutes are applied equally.

Lithuanian Law recognizes marriages concluded in Christian culture and by

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<sup>275</sup> Lithuanian Civil Code. Art. 3.26.

<sup>276</sup> MIKELĖNAS, V., *supra* note, 255, pp. 42-43; ADOMAVIČIUS, V., *Vedybų Sutartis*, Vilnius: Justitia, 2002, pp. 14-16. [ADOMAVIČIUS, V., *Marriage Contract*, Vilnius: Justitia, 2002].

<sup>277</sup> MEILIUS, *supra* note, 217; MEILIUS, *supra* note, 232; BRILIUS, *supra* note, 216; VAIČEKONIS, *supra* note, 213.

<sup>278</sup> Lithuanian Republic Constitution. Art. 38.

Christian Law, this can explain why many essential elements of marriage validation are the same in the canon and civil law. Besides, canon law and civil law are based on the same general laws of human nature.

Church marriage covers all requirements of the state marriage law and even has more marriage requirements compared to civil law. In order to identify and compare the requirements of civil law and church law, a review of these requirements is presented in Table 1. Comparison of the marriage requirements of both institutes, points out some differences. For example, civil law requires engaged persons, suffering from venereal disease or HIV, inform each other about their diseases before the marriage<sup>279</sup>. However, there is no such requirement in church law. Perhaps this is the only requirement that is not emphasized in the Canon Code of church law<sup>280</sup>.

According to Table 1, the church law emphasizes the following<sup>281</sup> marriage requirements: marriage can not be concluded if the woman was abducted for marriage, or if a previous spouse was murdered with an intention to make a new marriage; the marriage is not possible if the public eternal vow of celibacy was made in a monastery, if there are differences in religion, consecrations, absolute sexual impotence or if one of the spouses is already married.

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<sup>279</sup> Lithuanian Civil Code. Art. 3.40.

<sup>280</sup> Under to the Canon 1060 of Canon Code of Church Law, the law is favourable towards marriage, therefore in case of doubt the marriage must still be considered as valid unless there is a substantial proof that the information was withheld, then the validity of marriage may be dealt in the church court in compliance with Canon 1098.

<sup>281</sup> Different from civil law.

**Table 1**

**Valid Marriage Requirements of Church Law and Civil Law**

<b>Valid marriage requirements of Canon Law</b>	<b>Valid marriage requirements of state law</b>
Marriage is concluded following the free will of man and woman	Marriage is concluded following the free will of man and woman
Marriage is possible only with a person of different sex	Marriage is possible only with a person of different sex
Age of consent – 18 years	Age of consent – 18 years
Legal capacity (capability)	Only capable persons can make a marriage
Prohibition to violate the monogamy principle	Prohibition to violate the monogamy principle, i.e. the person who is married and is not divorced according to the order established by laws and is not allowed to make another marriage
Forbidden blood relations: a) affinity relations b) consanguinity relations of direct line (ascending and descending); c) consanguinity relations of collateral line; d) consanguinity relations according to the law	Marriage is not possible in the following cases: 1) blood relatives of direct line (parents are not allowed to get married with their children, as well as grandparents are not allowed to get married with grandchildren); 2) blood relatives of collateral line; 3) blood relatives according to the law
-	Engaged persons suffering from venereal disease or HIV must inform each other before the marriage
At the moment of marriage, both engaged persons must understand the meaning of their actions as well as to control their actions	At the moment of marriage, both engaged persons must understand the meaning of their actions as well as to control their actions
Valid marriage of christened persons is considered as real (concluded), only if the marriage was not consummated; marriage is considered as real and consummated, when the spouses make a marital act intended for giving birth to children and that is in a nature of marriage and due to which the spouses became as one body.	Marriage cannot be concluded just for show without an intention to create a family
The marriage is not possible in case the woman was abducted for marriage	-
Murder of a spouse with an intention to contract a new marriage	-
Public eternal vow of celibacy made in a monastery	-
Difference of religion	-
Consecrations	-
Absolute sexual impotency	-

The greater experience and practice of valid marriages by the Church can serve as an explanation for the large number of Church requirements and their particularity. Another reason for the great number of marriage requirements is the specific criteria people must meet to gain permission to participate in church marriage. These criteria include people who have given a public or eternal vow of celibacy in a monastery as well as people with consecrations. As specific attention is focused on recognition of sacramental (confessional) marriage in civil law and not vice versa, therefore, the strict requirements of church law are useful for marriage, i.e. the state does not obstruct the recognition of sacramental marriage and does not have any additional requirements.

## II. CHURCH REQUIREMENTS FOR A VALID MARRIAGE CONCLUSION

Canon law marriage requirements for a valid marriage conclusion or, in other words, impediments for marriage are considered as obstructive impediments (*impedimenta dirimentia*) in the Canon Code 1983<sup>282</sup>. These impediments are classified into two groups: 1) divine impediments or impediments of natural law (positive impediments) and 2) impediments of church law. The first group of impediments includes the following: absolute sexual impotency; marriage between persons related by blood in the direct line. The second group of impediments includes the following: differences of religion, consecrations, a public eternal vow of celibacy made in a monastery, the abduction of a woman with intention of marriage, murder of a spouse with intention to make a new marriage, blood relation in the collateral line, affinity relations, public vow and blood relations according to the law.

According to the Church concept, marriage is a covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children following the religious aspects of being baptized and raised by Christ the Lord to the dignity of a sacrament (Canon 1055)<sup>283</sup>. This Catholic marriage definition can serve as an answer to many questions engaged persons may have. First of all, the essential features of marriage are mentioned in this definition, i.e. unity and inseparable bond. Divorce is prohibited by Catholic doctrine. Moreover, the marriage cases solved by Church courts are not the cases of "divorce" as it is sometimes called by people.

These cases are only a statement of conditions why the marriage was invalid.

The Principle of marriage indissolubility demands serious self-determinations of the people to be married. Therefore, the Church has special preparation requirements for couples going to engage in marriage.

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<sup>282</sup> Each canon in the *1983 Code of Canon Law* (commonly called the "New Code") is a law of Pope John Paul II. The *1983 Code of Canon Law* reflects the mind of Vatican II in that the essentials and substance of the faith have been retained, while the way in which they are explained, communicated, and experienced have been adapted to modern times.

<sup>283</sup> This canon assumes implicitly that marriage was first instituted by God. But marriage became recognized as a sacrament in both East and West only in the 13 th century; hence in the church – not the Lord – that raised marriage to the dignity of a sacrament.

Under Canon Code Article 1058 “everyone has a right to marry unless prohibited by Law”. This right is one of the main rights of humans<sup>284</sup>. This right<sup>285</sup> allows a man or a woman the free will to choose a spouse and make a marriage. However, there are some restrictions of this natural right in civil law and canon law.

Free will of engaged persons is another important requirement of church law. Under to the 2<sup>nd</sup> paragraph of Canon 1057 “Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage”. Marriage is concluded by the legal and public consent of the newlyweds and no one can cancel or change this consent. This is an act of free will by which the man and woman irrevocably give and take each other to make a marriage and to fulfil the objectives of marriage. The open declaration of marriage consent is an essential condition for marriage validation. Without this consent no legal act can be concluded. Marriage is possible only between legally capable persons. An impediment of marriage consent is considered not only as a natural expression of the spouses' active capacity (i.e. mental ability), but also as a legal capacity, i.e. each person must have all legal rights and qualities necessary for both parties to contract a marriage according to law. Therefore, it is not enough for the newlyweds to be sufficiently developed or mature, the newlyweds must also be free of any impediments.

One of the main features indicates that marriage is only possible between people of different sex. This requirement is stated in paragraph 1 of Canon 1055, “The marriage is a covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, following the religious aspects of being baptized and raised by Christ the Lord to the dignity of a sacrament”.

Under Canon law, a valid marriage can be concluded by girls of 14 years and boys of 16 years<sup>286</sup>. These ages are the minimum requirements for marriage.

Similar to civil law, only people with a minimum age of 18 years are allowed to

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<sup>284</sup> Under Art. 8 of Human Rights declaration: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

<sup>285</sup> This fundamental right is rooted in the social nature of the human person and is recognized by Catholic social teaching. Therefore, the right to marry and to marry freely must be respected by both civil and ecclesiastical authority.

<sup>286</sup> Lithuanian Conference of Bishops does not acknowledge this exception; therefore, the consent age is the same for men and women, i.e. 16 years.

marry through the church<sup>287</sup>.

Existing and permanent impotence is one more impediment for a valid church marriage. According to paragraph 1 of Canon code 1083, “Existing and permanent impotence to have sexual intercourse, whether on the part of the man or the woman, absolute or relative by its very nature invalidates marriage”. However, the second Paragraph states “If the impediment of impotence is doubtful, whether the doubt is one of law or one of fact, marriage is not to be prevented nor, while the doubt persists, is it to be declared void”<sup>288</sup>. Impotence as a destructive impediment for a marriage must have the following characteristics:

1. Impotence must be in existence, i.e. the impotence should have existed before marriage or at the moment of marriage. The marriage can not be cancelled on the grounds of impotency appearing after marriage (*impotentia subsequens*) as a result of a disease, accident or other reasons. The only exception is when impotency becomes apparent soon after marriage and doctors are able to prove this medical condition before marriage.

2. Impotence must be immanent: if impotence is temporary or if the impotence can be cured, under normal circumstances the marriage cannot be annulled. However, according to the opinion of some canonists, if medical surgeries are too expensive or cause harm to other organs, the impotence should be considered as an obstruction for marriage. Unfortunately, in the terminology only incurable impotence is called immanent.

3. The impotence must be real; there must be no doubts about it. The right to get married is one of the main rights of a man, therefore, his marriage is considered as valid in case of any doubts about impotence.

4. Impotence can be absolute and relative. Absolute impotence is when a person cannot have intercourse with any person, i.e. partner. Relative impotence is when a person cannot have intercourse only with a particular person. Elderly people are not considered as “impotents” according to the Church doctrine and practice, they are considered as “sterile” (§ 3, 1084). Therefore, elderly people have a right to marry in

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<sup>287</sup> The church marriage of 16-year-old persons is considered as valid; however, a permission of Ordinary is necessary.

<sup>288</sup> CORIDEN, *supra* note 193, at 1083.

Church<sup>289</sup>.

Under Paragraph 1, Canon 1085 “A person bound by the bond of a previous marriage, even if not consummated, invalidly attempts marriage<sup>290</sup>”. This impediment is considered as an impediment of Natural and Canon Law, because it is based on the essential features of marriage: unity and inseparable. Two conditions are necessary for the existence of the impediment emphasized in Paragraph 1 of Canon 1085: a) a person who is held to the bond of a prior marriage, even if it has not been consummated, invalidly attempts marriage; b) even if the prior marriage is invalid or dissolved for any reason whatsoever, it is not on that account permitted to conclude another before the nullity or the dissolution of the prior marriage has been legitimately and certainly established<sup>291</sup>. This impediment also applies to the non-baptized, because, besides the fact that CIC is applied only for Roman Catholics, the CIC (Canon Code) recognizes marriages contracted by non-baptized people in other Christian churches as sacramental according to Natural Law.

Under Canon 1087 “Those who are in sacred orders invalidly attempt marriage”. The matrimonial sacred order impediment is based on the Celibacy Law (Canon 277). In the Latin Church in order to become a priest and to distinguish oneself from a secular caste, one is obliged to take an irrevocable vow of celibacy. According to the Canon law institution celibacy is not from the Divine origin; but from the Church<sup>292</sup>. This impediment existed in the Latin Church in the IV century. Celibacy was mentioned for the first time approximately 300 AD in Spain by the Elvira Council. In the Latin Church, celibacy was announced as an impediment for marriage in the First Lateran Council in the XII th. century (approximately 1123). According to the current Code of Canon Law, celibacy is obligatory for bishops, priests and deacons, (excluding married bishops, priests and deacons). The impediment of sacred orders is related to the vow of celibacy. Respective church authorities may dispense from the vow of celibacy at the same moment giving or cancelling their right to continue exercising the powers of sacred orders<sup>293</sup>. Dispensing is reserved for the Apostolic See<sup>294</sup>. According to Canon 1088, those who are bound by a

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<sup>289</sup> SHEEDY, G., *The Canon Law, Letter and Spirit*, Chicago: Canon Law Society, 1995, pp. 298 – 312.

<sup>290</sup> Marriage here means a valid marriage, sacramental or not, consummated or not. An invalid bond can never create an impediment.

<sup>291</sup> ÖRSY, *supra* note 99, pp. 111-112.

<sup>292</sup> MEILIUS, K., “Celibato Prigimtis ir Kanoniniai Padariniai”, *Jurisprudencija*, 2002 (23), 80-82. [MEILIUS, K., “Origin of Celibacy and Canons”, *Jurisprudencija*, 2002 (23)].

<sup>293</sup> BEAL, *supra* note 144, pp. 1288-1289.

<sup>294</sup> CORIDEN, *supra* note 193, at 1078 § 2.



public perpetual vow of chastity in a monastery invalidly attempt marriage. A public vow is a vow made by a person to a competent church Elder; the rest of the vows are private irrespective of their type (simple vows or solemn vows). An eternal vow is a life-long vow<sup>295</sup>.

According to Canon 1089, “No marriage can exist between a man and a woman who has been abducted, or at least detained, with a view to contracting a marriage with her, unless the woman, after she has been separated from her abductor and established in a safe and free place, chooses marriage of her own accord”. This marital impediment defends the right of women to choose marriage without being forced. This impediment appears when the abducted woman is being frightened or forced into marriage. A man wishing to marry an abducted woman as well as a woman or other interested persons aiding in the abduction are considered as an abductor. It is important, that the abduction and detention of a woman would occur with the motive of contracting a marriage. Other motives, such as political, terrorist, revenge and hate are not considered as the impediment mentioned in Canon 1089.

Under Canon law, marriage is not possible if a spouse has been murdered for the contracting of a new marriage. Canon 1090 states: “One who, with a view to entering marriage with a particular person, has killed that person's spouse, or his or her own spouse, invalidly attempts this marriage”. The “crime” that gives rise to an impediment to marriage is conjugicide, although, historically the primary focus of this impediment was adultery<sup>296</sup>.

Civil law does not view this as an impediment for contracting a marriage. The origin of this impediment is constant, thus a dispensation from this impediment is possible from Apostolic See (Can. 1078 § 2). However, the dispensation may be only given in the case with very important motives providing the murder is secret and does not cause outrage to immediate family and society. The Apostolic Penitentiary has a competence of dispensation as well. Two dispensations are necessary in a murder case of partner spouses or a spouse of another person with whom the marriage is intended<sup>297</sup>.

“Blood relations” also may be considered as an impediment for the church marriage as it is forbidden between persons related by blood in a direct line (even if the “blood-relation” is associated to the adoption of a child), i.e. between parents and children, people of a collateral line, i.e. between brothers and sisters (Can. 1078 § 3 ).

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<sup>295</sup> SHEEDY, *supra* note 289, pp. 298 - 312.

<sup>296</sup> NAVARRETE, U., *Gli Impedimenti Relativi Alla Dignita Dell’Uomo*, Roma: Periodica, 1978, pp. 88-94.

<sup>297</sup> SHEEDY, *supra* note 289, pp. 310-315.

In other cases of marriage between relatives, a permission of the Pontiff must be obtained. This means marriage with a brother-in-law or a sister-in-law is forbidden without the permission of the Pontiff, for example, a husband is not allowed to marry the sister of his ex-wife. According to Canon 1091 1 §, “Marriage is invalid between those related by consanguinity in all degrees of the direct line, whether ascending or descending, legitimate or natural<sup>298</sup>.”

In the collateral line, marriage is invalid up to the fourth degree inclusive<sup>299</sup>. Further, among those who are related in the collateral line no marriage is permitted up to the fourth degree inclusive, which in common parlance means “no marriage between first cousins”. Note that in each line there have been two acts of generation or that there are four persons involved, not counting the common grandparent<sup>300</sup>.

The impediment of consanguinity is not multiplied<sup>301</sup>. When two persons have more than one proximate common ancestor, in the biological order there is a multiplication of the relationship of consanguinity. E.g. if a man and a woman have two common grandfathers or grandmothers, biologically they are more closely related than if they had just one<sup>302</sup>.

A marriage is never to be permitted if a doubt exists as to whether the parties are related by consanguinity in any degree of the direct line, or in the second degree of the collateral line<sup>303</sup>. According to the etymology, consanguinity means a group of persons of the same blood. According to the legal definition, the consanguinity means people from the same family tree. Line is a sequence of people descending from the same family tree. The kinship of a direct line is the relationship between two people, one of whom has his or her origin directly or indirectly from the other: father, son, grandson, etc. The kinship of a collateral line is the relationship between two people who have a common ancestor but do not originate from one another: brothers, sisters, cousins, uncle and a nephew, etc.

Under Canon 1078 § 1, the dispensation may be given by Apostolic See or by a local Ordinary. However, in order to receive a dispensation from this impediment serious reasoning is necessary. In case the dispensation is given to one of the parties to be married,

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<sup>298</sup> BEAL, *supra* note 144, p. 1292.

<sup>299</sup> Canon 1091 2 §.

<sup>300</sup> ÖRSY, *supra* note 99, p. 121.

<sup>301</sup> Canon 1091 3 §.

<sup>302</sup> ÖRSY, *supra* note 99, p. 121.

<sup>303</sup> Canon 1091 4 §.

the dispensation automatically is given to the second party.

According to Canon 1092, “Affinity in any degree of the direct line invalidates marriage”. Affinity between a husband and sister-in-law and wife and brother-in law can be called matrimonial affinity. It is a relation between relatives of a husband and wife. This affinity is considered of legal and customary type rather than of natural type. The basis of this affinity is a valid marriage, even if not consummated. In case the marriage is declared as invalid, then the matrimonial affinity would also become invalid and turn to the impediment of public propriety<sup>304</sup>. Degrees are used to calculate affinity: affinity between daughter-in-law and father-in-law or son-in-law and mother-in law is considered as an affinity of first degree in the direct line. The affinity in the collateral line is abolished. Therefore, a husband, after the death of his wife is allowed to marry his deceased wife’s sister. There is no affinity between the relatives of the both parties as well: for example, widower John and widow Ann marry. However, both of them have children from their previous marriages. There is marriage affinity between children born in previous families of John and Ann. However, there is no marriage affinity between children of John and Ann. Affinity like consanguinity is a perpetual impediment and does not disappear after the death of a spouse. This impediment is foreseen in the church law requirements for the validation of marriage, therefore only the Church can dispense of it. The dispensation may be given by a local Ordinary (Canon 1078).

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<sup>304</sup> BEAL, *supra* note 144, p. 1293.

### III. STATE REQUIREMENTS FOR A VALID CONCLUSION OF MARRIAGE

State requirements<sup>305</sup> for concluding a valid marriage are described in Articles 3.12-3.17 of the LR CC. There are six requirements for contracting a valid marriage in the Lithuanian Republic CC, which provide the following: 1) marriage is prohibited between people of the same sex; 2) voluntary nature of marriage; 3) consent age; 4) active capacity; 5) violation of the monogamy principle and 6) the prohibition to contract marriage between close relatives. In addition to these direct requirements there are several conditions<sup>306</sup>, stated in the Article 3.21 and Article 3.39 – 3.40, that make marriage invalid. One of the mentioned conditioned is that the future spouse, suffering from a venereal disease or HIV, must inform the other spouse about this disease<sup>307</sup>.

The second condition – at the moment of marriage both engaged persons must understand the meaning of their actions: 1) the decision of future spouse must not be influenced by threats, duress or fraud; 2) future spouse must know the following information related to the other spouse before contracting a marriage: a) state of health and sexual anomaly due to which normal life of a family is not possible; b) serious crime committed. The second condition is of great relevance and importance for contracting a marriage. However, the condition that spouses, suffering from venereal disease or HIV, must inform the other spouse about it, raises some questions, because there is no definition about the diseases that are to be considered as venereal. Therefore, this article of the law must be revised by defining what is meant by “venereal diseases”. Furthermore, in order to prevent any violations related to the article mentioned above, it is necessary to make the submission of documents on health state of spouses to Institution of Civil Registry obligatory, because according to the Part 2 of Article 3.21 of the current CC, “Failure to submit a doctor’s certificate shall not be an impediment for the registration of the marriage”<sup>308</sup>.

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<sup>305</sup> Under Art. 2 of Hague Convention on Celebration and Recognition of the Validity of Marriages: The formal requirements for marriages shall be governed by the law of the State of celebration.

<sup>306</sup> They can be called as the term used by the CIC, i.e. ‘marriage impediments’.

<sup>307</sup> Under Article 3.21, part 3: “Failure of one of the parties to an intended marriage to inform the other party that he or she is suffering from a venereal disease or HIV shall provide a cause for rendering the marriage null and void”.

<sup>308</sup> Lithuanian Civil Code. Art. 3.21, part 2.

Having made the submission of the mentioned documents obligatory, the execution of Part 3 of Article 3.40 (a spouse who gave consent to the marriage in consequence of an essential mistake) may seek the nullity of the marriage. The mistake is presumed to be essential if it is a mistake about the circumstances related to the other party, the knowledge of which would have been a sufficient reason for the party not to enter into the marriage. Such a mistake is possible about the state of health of the other spouse as well as sexual anomaly due to which normal life of a family is not possible<sup>309</sup>. Hence, such mistakes would be prevented if the spouses were required to submit a state-of-health documents to the Civil Registry Institution. The mentioned problem is faced again when people only get married through the church, because the Church does not demand the presentation of medical certificates.

According to state law, marriage has a specific feature and purpose, i.e. to create a family. In absence of such purpose, i.e. if the marriage is contracted without a view to create a family, the marriage may be declared null and void. This requirement is stated in Article 3.39 of the CC: “A marriage formed fictitiously without the true intention of creating a legal family relationship may be declared null and void on the petition of either spouse or a public prosecutor”. The same requirement exists under church law<sup>310</sup>.

Under the state law, absence of purpose to create a family results in invalid marriage. However, this impediment usually depends on the will and inner self-determination of the parties to be married; therefore, it is hard to prove the existence of this impediment before marriage. Usually, such fictitious marriage is contracted following a material interest, for example if known via an advertisement in the newspapers; “I’m looking for a Green Card holder for contracting a marriage”. Another aspect of this article is the possible misuse by spouses, where they intend to declare marriage as null by stating their marriage was fictitious.

Different sex of spouses is considered as one of the main conditions for contracting marriage by the state and also by the Church. This essential condition for contracting marriage is defined in the CC<sup>311</sup> as well as in the Constitution of the

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<sup>309</sup> Lithuanian Civil Code. Art. 3.40.

<sup>310</sup> According to the § 1, Can 1061 valid marriage between baptised persons is said to be merely ratified, if it is not consummated; ratified and consummated, if the spouses have, in a human manner, got engaged together in a conjugal act apt for the procreation. This act is in the very nature of marriage and by it the spouses become one flesh.

<sup>311</sup> Lithuanian Civil Code. Art. 3.12.

Lithuanian Republic. This provision is not acceptable for homosexual people, who wish marriage was possible between people of the same sex. The laws prohibit discrimination due to sexual orientation; however, marriage is possible only between people of different sex. In this regard, the system of Lithuanian law is not favourable for homosexuals, because there also exists a prohibition to register partnerships between people of the same sex. The different sex of spouses is an essential condition for contracting marriage and registration of partnership not only in Lithuania, but also in Poland, Russia and many other countries<sup>312</sup>.

Free will of the newlyweds, i.e. voluntary nature of marriage, is also important for contracting marriage. According to Article 3.13 of the CC, marriage is contracted with the free will of man and woman, any threat, coercion, deceit or any other lack of free will provide the grounds on which the marriage is declared null and void. A man and woman must express their will when concluding a marriage, this will must not be based on threat, coercion, deceit or any other limiting factors, otherwise, the marriage may be declared as void. Therefore, the decision for contracting a marriage should not be influenced by other persons, i.e. parents, friends, etc. The voluntary nature of marriage means that people agree to create a family voluntarily and this agreement is the same as their inner wish. This condition is closely linked to the requirement of active capacity<sup>313</sup>, because legally incapacitated persons do not understand the meaning of their own actions and are not able to control them. This means, the condition of voluntary nature of marriage is also applicable to incapacitated people. Active capacity is an ability of a person to acquire rights and to create obligations by their own actions. According to the CC, a person who has been declared by the court as legally incapacitated may not contract a marriage. The CC also states, knowledge of a case pending before the court for the declaration of one of

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<sup>312</sup> As was mentioned in the footnote 20<sup>th</sup> ten European countries legally recognize same-sex marriage, namely Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. An additional fourteen have a form of civil union or unregistered cohabitation. San Marino only allows immigration and cohabitation of a citizen's partner. The same-sex marriage are also allowed in Argentina, Brazil, Canada, New Zealand, South Africa, Uruguay and several sub-national jurisdictions (parts of Mexico and the United States) allow same-sex couples to marry.

<sup>313</sup> Capacity generally refers to the mental ability of one or both of the parties to the marriage to agree to become husband and wife. Both parties must be of "sound" mind and capable of agreeing to the marriage. Not all forms of mental illness and insanity serve to render someone incapable of entering into a marriage. A common test of capacity is the ability of individuals to understand the nature of marriage and what their responsibilities are to their partners once they enter into the union. Physical incapacity, and in particular the physical inability to have sexual intercourse, does not in and of itself render one incapable of marrying and does not on its face void a marriage that has already occurred.

the parties to an intended marriage to be legally incapacitated, is the reason for the registration of the marriage to be postponed until the court decision is made.

Active capacity is closely linked with another condition of marriage, i.e. age of consent. According to the Civil Code, marriage is possible only between people no younger than 18 years<sup>314</sup>. However, this impediment is not imperative, as there are some exceptions for the age of consent in the following situations:

1) Marriage of a person under 18 years of age. In this case, the age of consent may be reduced by a court's decision, in a summary procedure, according to the request of the under age person. However, there is an age limit for the reduction of consent in the laws. The minimum age of a spouse is 15 years of age<sup>315</sup>.

2) Pregnancy as a reason for marriage. In this case the permission for marriage is also given by the court. However, in contrary to the above situation, the court has the right to give marriage permission for people under 15 years<sup>316</sup>.

While deciding on the reduction of a person's legal age of consent to marriage, the court must hear the opinion of the juvenile's parents or guardians and consider the juvenile's mental or psychological condition, financial situation and other important reasons why the person's legal age of consent to marriage should be reduced.

Pregnancy is considered as one of the reasons. In the process of deciding on the reduction of the legal age of consent to marriage, the State Institution for the Protection of the Children's Rights must advise its opinion on the reduction of the juvenile's legal age of consent to marriage and whether a reduction is in the true interests of the person concerned<sup>317</sup>.

Age<sup>318</sup> of consent as an impediment for contracting marriage goes current in all countries. The age of consent may be defined as the minimum age provided by the law, at which a person can contract a marriage. The minimum age limit is applicable on the grounds of physical and psychical maturity, required for contracting marriage.

Article 3.16 of the CC refers to another marriage condition, the principle of

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<sup>314</sup> Lithuanian Civil Code. Art. 3.14, part 1.

<sup>315</sup> *Id.*, Art. 3.14, part 2.

<sup>316</sup> *Id.*, Art. 3.14, part 3.

<sup>317</sup> AYER, E., *Teen Marriage*, New York: The Rosen Publishing Group, 1990, pp. 17-19.

<sup>318</sup> Age is an additional aspect of consent to marry. All states prescribe the age which must be reached by both parties to the marriage for the couple to be able to legally agree to become husband and wife without parental permission and court decision.

monogamy<sup>319</sup>. This requirement for a valid marriage is based on the relationship regulation between a man and a woman in the course of many centuries. Theoreticians of Family Law argue when the relationship between a man and a woman is to be considered as a bigamy or polygamy in case of violation of the monogamy principle. According to G. Matvejev the actual matrimonial relationship of a man and a woman is not an impediment for registration of marriage with another man or woman. This opinion is opposed by V. Riazencev, who considers the actual matrimonial relationship of a man and a woman as bigamy or polygamy, irrespective to whether one of the spouses has registered a marriage with another man or woman<sup>320</sup>.

The last condition, provided in the CC, is related to the prohibition of contracting a marriage between close relatives<sup>321</sup>. This provision prohibits marriage between parents and children, adopters and adoptee, grandparents and grandchildren, brothers and sisters, cousins, uncles and nieces, aunts and nephews<sup>322</sup>. Attention should be paid to the fact of consanguinity, which is the basis for the prohibition to contract marriage between close relatives irrespective whether legal validation of this consanguinity is available or not. The LR CC applies this impediment for a larger group of people than are the cases in Poland, Russia and Belarus.

By introducing impediments for contracting marriage the State and Church define certain limits that should not be violated by people. These impediments are intended to ensure rights and freedom of people and to prevent any violation related to these rights and freedom. Impediments for contracting marriage, defined in the civil codes of different countries, may differ in terms of their sequence and legal formulation. Impediments of Canon Law defined in the Canon Code (1983) of church law are the same for all countries in which marriage is contracted according to the requirements of the Catholic Church. All requirements overviewed in this chapter are important for contracting marriage, however, following the objectives of this study, greater attention is paid to the requirements, which are common for both state and church law, i.e. different sex of spouses, voluntary nature of

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<sup>319</sup> Monogamy (one husband- one wife) is one of the main principles for regulation of marriage and family relations not only in our country, but in many modern countries as well.

<sup>320</sup> ZVINKLIENĖ, A., *The Family Position Today*, Vilnius: Institute of Philosophy and Sociology, 1994, p.

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<sup>321</sup> The laws of different countries strictly regulate the marriage between relatives (also known as consanguinity). According to the "rules of consanguinity," no state allows marriage to a child, grandchild, parent, grandparent, uncle, aunt, niece, or nephew. However, for all other familial relationships, the states vary widely and the particular laws of the state of marriage must be consulted.

<sup>322</sup> Lithuanian Civil Code. Art. 3.17.



marriage and age of consent.

In order to validate the research hypotheses that I have proposed and to disclose similarities and differences of the Church and State attitude to the marriage requirements, in the next chapters of this work, I will more deeply analyze some general requirements for a valid marriage conclusion: such as spouses' age of content, the application of free will for a valid marriage and a different sex of spouses.

#### IV. DIFFERENT SEX OF SPOUSES AS ONE OF THE MAIN CHURCH AND STATE REQUIREMENTS FOR A VALID MARRIAGE CONCLUSION

##### A. POSITION OF LITHUANIAN DOMESTIC CIVIL LAW ON DIFFERENT SEX OF SPOUSES AS ONE OF THE MAIN REQUIREMENTS FOR CONCLUSION OF A VALID MARRIAGE

Different sex of spouses as a requirement for contracting marriage was accentuated and solidified in the Lithuanian Republic state Law not long ago, i.e. it was included into Constitution of the Lithuanian Republic in 1992 and into CC - in 2001. This requirement did not exist in the previous laws, as according to dominating public opinion marriage was possible only between a man and a woman.

Analysis of the Lithuanian Statutes shows that in all mentioned cases marriage is meant to be between a man and woman, and if the term "persons" is used, it means two people of different sex.

According to Russian scientist I. Chaderka, even those countries not prohibiting other forms of marriage in addition to monogamy, require marriage to be formed by people of different sex, i.e. marriage may be contracted by one man and several women or by one woman and several men<sup>323</sup>.

The position of civil law regarding different sex of spouses as one of the main

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<sup>323</sup> CHADERKA, I., *Vstyplienie brak*, Moskva: Juridiceskaja Literatura, 1980.

requirements for contracting a valid marriage becomes clear from Article 3.7 of the LR CC, “Marriage is a voluntary agreement between a man and a woman to create legal family relations executed in the procedure provided for by law”. This position is based on traditional, moral and religious attitudes of society towards family, because one of the main functions of a family is reproduction and people of the same sex are not able to fulfil this function naturally. In Lithuania, marriage prohibition for people of the same sex as a condition for contracting a valid marriage is stated in Article 3.12 of the LR CC, which states that marriage is only possible between people of different sex. Different sex of spouses is also emphasized in the requirement for voluntary nature of marriage, i.e. in Part 1 of Article 3.13 of the LR CC. According to this Article, “Marriage shall be contracted by a man and a woman of their own free will”. The requirement of different sex is applied not only for contracting marriage, but also for the registration of a partnership. These requirements are of an imperative nature and a matter of public order, therefore, marriages or partnerships between persons of the same sex concluded abroad by Lithuanian citizens or people permanently residing in Lithuania will not be valid in Lithuania, as it contradicts the public order established by the Constitution and other laws of the Lithuanian Republic. In the above cases the civil laws of the Lithuanian Republic are applied (Civil Code. Art. 1.11.)

The Constitution of the Lithuanian Republic also permits the marriage only between people of different sex. According to Article 38 of the Lithuanian Republic Constitution, “a marriage is contracted on the free will of a man and woman”.

The Constitutional Court of the Lithuanian Republic held, that the family is the common life of a man and a woman<sup>324</sup>.

Hence, only traditional marriages between people of different sex are legalized in Lithuania. It means that Lithuania prohibits the marriage of people of the same sex and couples of the same sex are not able to acquire matrimonial rights and responsibilities foreseen in the laws. Homosexual couples do not have any matrimonial rights in Lithuania, because there are no institutions for regulation of matrimonial relations between people of the same sex.

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<sup>324</sup> Lithuanian the Constitutional Court case No. 21/2008, 28 September, 2011.

## B. POSITION OF THE CHURCH ON DIFFERENT SEX OF SPOUSES AS ONE OF THE MAIN REQUIREMENTS FOR CONCLUSION OF A VALID MARRIAGE

In all religious<sup>325</sup> traditions the values of marriage and family are sacred... [R]eligion has assumed the role in history as protector of the deepest human relationships... Indeed, it may be said...that monogamous marriage itself as traditionally understood, with its duties and rights and the ethical dimensions of sexual relationships, procreation and child-care, are themselves the creation of religious faith<sup>326</sup>.

Since the existence of Christianity, the Church has recognized only the marriages contracted between people of different sex. This tradition is maintained by the prevailing Catholic Church in Lithuania. The above mentioned requirement was included into the Canon Codes of 1917 and 1983. The first Code did not clearly state marriage between a man and woman to be the only possibility, however, from the main purpose definition of marriage, given in §1 of Canon Code 1917<sup>327</sup> as well as the legislation on marriage, it becomes obvious that marriage is possible only between people of different sex. According to the Canon Code (1983), marriage is “a covenant, by which a man and a woman establish between themselves a partnership of their whole life<sup>328</sup>”. From this definition it becomes clear, that only people of different sex are allowed to contract marriage. The different sex of spouses as a requirement for contracting marriage is also emphasized in Canon 1056 by defining one of the essential properties of marriage, i.e. unity, the union of one man and one woman. The Church’s position on the different sex of spouses is also reflected in the definition of matrimonial consent § 2, Canon 1057 - “Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage<sup>329</sup>”.

The Church is an institution with well established moral values and their own world-outlook, whereas the State does not have such ideology. The Church maintains a constant clear position on different sex of spouses as one of the main requirements for

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<sup>325</sup> Some liberal religious congregations, including Reform Judaism and Unitarianism, conduct same-sex wedding ceremonies, but these are not recognized under civil law.

<sup>326</sup> BASSETT, W. and DURHAM, C., *Religious Organizations and the Law*, Vol. 2, at § 10:2, New York: Thomson West, 2008, pp. 145-148.

<sup>327</sup> I. e. “procreation and upbringing of children”.

<sup>328</sup> CORIDEN, *supra* note 193, at 1055 § 1.

<sup>329</sup> SHERBA, G., *Canon 1096 on Ignorance with Application to Tribunal and Pastoral Practice*, New York: ES Gorham, 2001, p. 119.

contracting a valid marriage; meanwhile, there is no clear motivation or reasoning provided by the state in validation of marriage between people of different sex. In its requirement on different sex of spouses, the Lithuanian Republic maintains its position based on old traditions and the welfare of society. Talking about relations of people of the same sex, the Church emphasizes the nature and essential properties of marriage, the absence of which would make marriage impossible<sup>330</sup>.

Church teaching about marriage and interrelation of sexes is considered obvious for a sound mind and is recognized by all the great cultures of the world. Marriage is not a union of human creatures. According to Church teaching, Christian marriage is a sign of unity between Christ and His Church (according to Ef 5, 32). Such a meaning of Christian marriage does not diminish the deep human meaning of the union between man and woman; on the contrary, it confirms and emphasizes the human meaning of marriage. The Church considers marriage as sacred; meanwhile, homosexual relations are considered to contradict natural moral law. Homosexual intercourse “closes the sexual act to the gift of life<sup>331</sup>”.

The same moral interpretation was typical for many Church writers in the first centuries<sup>332</sup> and became a Catholic tradition.

Homosexual relations are relations between men or women that are sexually attracted only to people of the same sex. Homosexuality has been expressed in many different ways throughout history and cultures. The origin of homosexual relations in its psychical aspect is still not known. The Church does not condemn or reject homosexual people, stating, one must behave with such people in a respectful manner and with sympathy, because these people are called to exercise God’s will in their life. According to the teaching of Church, homosexual men or women should be treated “in a respectful manner, with sympathy, tact and ostracism avoidance”<sup>333</sup>. These people, like other Christians, are called to live in chastity.

The Church, however, preaches procreation, the upbringing of children and prolongation of family to be the main purpose for contracting marriage. The Church considers relationships between people of the same sex as a violation of God’s will, natural

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<sup>330</sup> VAIČEKONIS, *supra* note 213, p. 37.

<sup>331</sup> COCHRANE, M., *Surviving your Divorce: a Guide to Canadian Family Law*, Ontario: John Wiley & Sons, 2007, p. 145.

<sup>332</sup> HUNTER, *supra* note 127, p. 14.

<sup>333</sup> ŽIŪKAS, *supra* note 198, pp. 16-18.

law and human nature. J. Dormody stated: “Such relations are disastrous for humanity; they are a moral and ethical anomaly that can not be justified”<sup>334</sup>.

### C. DIFFERENT SEX OF SPOUSES AS ONE OF THE MAIN REQUIREMENTS FOR A VALID MARRIAGE CONCLUSION IN FOREIGN COUNTRIES

Different sex of spouses is one of the essential requirements for contracting a valid marriage in many foreign countries. Currently eleven Member states of the EU do not offer any legal recognition for same sex relationships<sup>335</sup>.

The constitutions of Belarus, Bulgaria, Croatia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia and Ukraine define marriage as a union between a man and a woman<sup>336</sup>.

Meanwhile, the principle of different sex of spouses is included in the requirement on voluntary nature of marriage in Russia. Part 1, Article 12 of the Russian Federation Family Code states that voluntary consent of a man and a woman for contracting marriage is necessary. This fact is also confirmed by Russian lawyer L. M. Pcielnicieva, who states that only marriage between a man and a woman is possible and marriage between people of the same sex is prohibited in the Russian Federation<sup>337</sup>.

The same situation occurs in Poland. There is no separate article on the prohibition of marriage between people of the same sex in the Family and Custody Code of Poland. However, Article 1 of the mentioned Code clearly states, marriage is contracted, when a man and a woman swear they are contracting a marriage before the competent officer in the civil registry institution.

In Germany<sup>338</sup>, in order to contract a valid marriage, the parties must be

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<sup>334</sup> DORMODY, J., *School, Church and the World: Some Perceptions and Expectations of young Catholics*, Oakleigh: Institute of Catholic Education, 1990, p. 27.

<sup>335</sup> These countries are: Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania and Slovakia.

<sup>336</sup> *Same-sex marriage*, <http://politicsinhungary.wordpress.com/2013/12/02/same-sex-marriage/>, (last visited December 29, 2013).

<sup>337</sup> PCIELINCIEVA, L., *Komientarii k Semeinomu Kodeksy Possiskoi Fedieracii*, Moskva: Norma, 2003, p. 67.

<sup>338</sup> Marriage and civil partnerships are the forms of legal union in Germany. Marriage is protected under the

respectively male and female<sup>339</sup>. While the law does not state this in clear terms, it has always been accepted that marriages must be heterosexual, and that the constitutional protection of marriage applies only to such marriages<sup>340</sup>.

In Decision 138/2012 (April 2010)<sup>341</sup>, the Italian *Corte Costituzionale* (CC) ruled that Articles 3, 29 and 2 of the Italian Constitution<sup>342</sup> cannot be read to mean that the right to same-sex marriage has constitutional ranking in the Italian legal system. Rather, the CC insisted that Article 29 embodies a “naturalistic” definition of marriage that presupposes gender diversity.

However the conception of ‘marriage’ has been growing wider during the last decade. Some argue that marriage is defined narrowly as only being between a man and a woman, so gays can’t possibly marry. The fact is, though, that the nature of marriage has changed in definition and make-up many times over the centuries. The first laws enabling same-sex marriage in modern times were enacted during the first decade of the 21st century.

This approach to the conception of ‘marriage’ I presented only for the purpose to show a different attitude, but as the purpose of this work is to analyze the institution of marriage in the context of Lithuanian civil and Catholic Church laws, deeper analysis on this point isn’t expedient.

For example in *Schalk and Kopf v Austria*<sup>343</sup> the European Court of Human Rights (ECtHR) recognised that same-sex couples enjoy the right to “respect for family life” protected by Article 8 of the ECHR, and this article argues that this mandates some form of legal recognition of same-sex relationships by all contracting states of the ECHR and paves the way for equality in the family realm for same-sex couples. The Court refers

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Constitution while civil partnerships were introduced in 2001. Civil partnerships were introduced in Germany in 2001 under the *Eingetragene Lebensgemeinschaft* (Life Partnership Act), which gave same-sex couples legal recognition of their status. Civil partnership is a legal union between the same-sex couples. It offers many of the same rights as marriage, including taking of names, pension and health insurance, immigration and pensions. There are also some aspects in which civil partnerships do not currently enjoy the same rights, specifically in the areas of taxation and adoption.

<sup>339</sup> Since 1 August 2001, Germany has allowed registered life partnerships (*Eingetragene Lebenspartnerschaft*) for same-sex couples. These partnerships provide most but not all of the rights of marriage.

<sup>340</sup> PCIELINCIEVA, *supra* note 337, p. 168.

<sup>341</sup> Italian Case, Decision 138/2012 (April 2010).

<sup>342</sup> *The Constitution of the Italian Republic*. (Official Gazette, December 27, 1947, n. 298), <http://legislationline.org/download/action/download/id/1613/file/b4371e43dc8cf675b67904284951.htm/previ ew>, (last visited December 29, 2013).

<sup>343</sup> *Schalk and Kopf v Austria*, Application No. 30141/04. Merts, 24 June 2010.

to the right to marry as provided for in Art. 9 of the EU Charter of Fundamental Rights, which contains no reference to ‘men and women’, and which leaves the decision whether or not to allow same-sex marriage to regulation by Member States’ national law. The Court therefore ‘would no longer consider that the right to marry enshrined in Art. 12 must in all circumstances be limited to marriage between two persons of the opposite sex’ and declares Art. 12 ECHR applicable to the applicants’ complaint. However, because marriage has ‘deep-rooted social and cultural connotations differing largely from one society to another’, the Court holds that national authorities are best placed to assess and respond to the needs of society in this field. The Court concludes that Art. 12 ECHR does not impose an obligation on States to grant same-sex couples access to marriage and unanimously holds that there had been no violation of that provision.

Cases of *Grant*<sup>344</sup> and *D. and Sweden v. Council*<sup>345</sup>, where the Court of Justice of the European Union (CJEU) a privileged position to heterosexual marriages and which are sometimes used to claim that CJEU upholds only “traditional” families, do not in fact exclude same-sex marriages. In the lawsuit *Grant vs. South-West Trains*, the European Court of Justice decided, according to the principles held in the EU on the sexual equality, that discrimination on the grounds of sexual orientation is not prohibited and relationships between people of the same sex are not considered as equivalent to marriage or non-matrimonial relationships of spouses of different sex. At that point of time, the EC law did not yet cover discrimination based on sexual orientation. The things have changed already with the entry of the force of Treaty of Amsterdam (and the insertion of Article 6a). The Lisbon treaty and entry into force of the Charter, as well as rapid development under the ECHR and in substantive legal systems of member states have changed the picture altogether. Moreover, *Grant* and *D. and Sweden v. Council* cases actually did not analyze the issue of same-sex marriages at all. These cases concerned different-sex and same-sex partnerships’ (non) equivalent to marriage. Notably, the stance of the Court since then has been reversed by the judgments in cases of *Maruko* and *Römer*. A landmark decision was adopted in 2008 in *Maruko v. VdB* which clearly overrules a former line of reasoning<sup>346</sup>. The case concerned registered same-sex partners and denial of survivors’ benefits under a compulsory occupational pensions scheme. The Court admitted that civil status is not an

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<sup>344</sup> Case C-249/96, *Grant v. South-West Trains* [1998] ECR I-621.

<sup>345</sup> Case D and Kingdom of Sweden, Cases C-122/99 P & C-125/99 P [2001].

<sup>346</sup> C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*. Para 73.

EU competence, when exercising their competence, must comply with EU law, and in particular with the principle of non-discrimination. The Court indicated that indirect discrimination occurs where an apparently neutral provision, criterion or practice would put homosexuals at a particular disadvantage compared with other persons unless that practice or provision may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The legislation establishing that after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, was found inadequate, but the Court left for the German courts to determine whether Maruko was in a "situation comparable".

In *Jürgen Römer v. City of Hamburg* (C-147/08), the Advocate General (AG) have asked the Court to decide that same-sex partners should have equal access to employment benefits as heterosexual married couples. Protection of marriage and the family as such, the AG said, cannot serve as valid justification for such discrimination. It can be agreed with the simple conclusion that there are other means to protect family and marriage than discrimination of same-sex partners. In the recently adopted judgment in the *Römer* case the Court found<sup>347</sup> that different treatment on the basis of sexual orientation constitutes direct discrimination and as such is prohibited: it is a general principle of the EU law. Nevertheless, the effect of this judgment is limited. Both *Maruko* and *Römer* could only apply to cases where:

1. Partnerships are reserved to persons of same-sex;
2. Marriages are reserved to different-sex persons;
3. Same-sex partnerships and different-sex marriages are comparable both in fact and law.

On June 26, 2013, the U.S. Supreme Court issued its decision in *United States v. Windsor* and struck down the section of DOMA (federal Defense of Marriage Act) that defined marriage as a union between a man and a woman<sup>348</sup>. Under the Supreme Court's decision, same-sex married couples living in one of the U.S. jurisdictions that recognize same-sex marriage<sup>349</sup> would qualify for federal benefits previously limited to opposite-sex married couples.

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<sup>347</sup> C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, Judgment of 12 May 2011.

<sup>348</sup> USA case: *United States v. Windsor* [2013, June 26]. No. 12-307.

<sup>349</sup> 2013 of September California, Connecticut, Delaware, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington have all legalized same-sex marriage. These states will also recognize same-sex marriages made in other states.



The Italian *Corte di Cassazione* (CdC) has delivered a judgment which marks a fundamental change of direction in the treatment of same-sex marriage in the Italian legal system. Case 4184/12, decided on 15 March 2012, illustrates the piecemeal nature of legal developments affecting same-sex marriage, as well as the complex mix of issues that arise in this legal field. Same-sex marriage bridges private and public law, and implicates family, free movement, and equality (non-discrimination) rights found in national, European and international sources<sup>350</sup>. The CdC's March 2012 decision involves a fundamentally different fact pattern from those earlier cases, and its rationale invokes different legal sources. This case involves two Italian men who went to Holland, married there, then returned home to Italy and asked the competent Italian authority in Latina to register their marriage. The Italian authority refused to register the marriage, pursuant to a 2007 Ministry of Interior circular proscribing local authorities from registering same-sex marriages celebrated abroad on *ordre public* grounds. On appeal, the Italian pair argued that this refusal violated their rights to marry and to have a family life, as well as the principles of non-discrimination and self-determination. Their appeal was rejected by the Tribunal of Latina, the Court of Appeal in Rome, and the *Corte di Cassazione*. However, the CdC's decision breaks new ground, even though it does not go so far as to grant same-sex couples the right to marry or to have a foreign marriage registered in Italy<sup>351</sup>.

To sum up, the traditional definition of marriage is mostly related to couples of different sex. Such situation affects differences in cultural and religious traditions, moral value system and even State approach among the EU countries.

However, the changing social realities necessitated further elaboration on the issue, whether the State should accept alternative familial arrangements that are not based on marriage and that are not heterosexual in nature. More particularly in the international context, namely with regard to the openness to foreign marriages (especially of another European national source) or with regard to eventual arguments that could allow to deny their legal validity in a country as Lithuania, this thesis will below raise the questions that arise in the sections on recognition of marriages and of divorces.

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<sup>350</sup> FICHERA, M. and HARTNELL, H., *All you need is law: Same-sex Marriage in Italian Courts*, 2012, <http://www.verfassungsblog.de/de/all-you-need-is-law-same-sex-marriage-in-italian-courts-2/#.Usae2bRA5wt>, (last visited December 29, 2013).

<sup>351</sup> *Id.*, at 351.

## V. THE APPLICATION OF FREE WILL AS THE MAIN REQUIREMENT FOR A VALID CHURCH AND CIVIL MARRIAGE

### A. THE CIVIL LAW ATTITUDES TO THE NECESSITY OF ENGAGED PERSONS' FREE WILL STATEMENT TO CONCLUDE A VALID MARRIAGE

There have always been appropriate requirements to making a valid marriage. Some of them, such as the age of spouses and the prohibited degrees have undergone certain changes during history, but the requirement of free will has always been one of the main requirements to conclude a valid marriage<sup>352</sup>.

As it was previously stated, there is a close link between the Church and the State requirements to conclude a valid marriage. Sometimes it is hard to establish which one – the State or the Church created one or the other requirement for valid marriage, but the statement of free will is one of the main requirements for making a valid marriage.

Voluntary marriage is one of the main requirements to register a valid marriage, according to the Lithuanian Republic civil law<sup>353</sup>. The requirement for the free will of male and female, to make their marriage valid is indicated in the Lithuanian Republic Constitution under the principle of a human being's freedom. A human being can give consent for many different agreements according to his/her own free will principle. Article 20 of the Lithuanian Republic Constitution states, the freedom of a human being is inviolable and cannot be deprived, except following the special procedures and articles, which are indicated in the Lithuanian Republic Constitution. Article 20 of the Lithuanian Republic Constitution is confirmed by the Article 38, which states that the principle of human freedom is also valid in marriage, because marriage can only be concluded following the free will of male and female.

The problem of assuring the individual free will was already raised in the times of the Lithuanian Statutes (1529, 1566 and 1588). Men of marriageable age and good psychological condition could conclude a valid marriage of their own free will. Women

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<sup>352</sup> In the canon law.

<sup>353</sup> Lithuanian Civil Code. Art. 3.13.

were in a different position. In the 16 th. century free will was one of the main criteria to conclude a valid marriage, but the free will of a female was limited by some reasons related with the property relations<sup>354</sup>. In the Middle Ages there were no theoretical reasons to force people to marry against personal will; and if such marriage was concluded, it was considered not valid.

In the course of this study engaged persons were asked to identify which criterion is the main requirement for concluding a valid marriage. Results show that 43 percent of respondents think the main criterion to conclude a valid marriage is the principle of free will. The other criterion to conclude a valid marriage is the capability of engaged persons (12 %), age (11 %), state of health (10 %), and the monogamy of marriage (9 %)<sup>355</sup>.

The free will principle was one of the main requirements to conclude a valid marriage; this principle was described in the Article 15 of the Soviet Lithuanian Republic Statute book of Marriage and Family: “marriage is valid, if male and female agree to conclude a marriage according to their free will”<sup>356</sup>. Identical text was also written in the Lithuanian Republic Statute book of Marriage and Family, which was valid until 1 July 2001.

Voluntary marriage, as the main requirement is indicated in Article 3.13 of the Lithuanian Republic Civil Code. According to the first part of this article, marriage must be concluded by the free will of male and female. The consent of the engaged persons is the expression of their free will to create a family. This reflects the manifestation of free agreement between the spouses through their love and respect of each other, and collective beliefs, but not due to menace, tricks or other similar reasons. The second part of the Lithuanian Republic CC Article 3.13 states two reasons for the annulment or invalidity based on lack of free will: 1) the volition requirement can be violated in the case of external objective reasons, for instance when a person is forced to marry by outer forces (assault, constraint or trick, when the person does not know some circumstances, which can induce him/her not to marry); 2) the voluntary principle of marriage can be violated in the case when a married person has a subjective understanding of the real meaning of his own actions or makes a mistake<sup>357</sup>. These cases are possible when the person concludes the

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<sup>354</sup> ANDRIULIS, *supra* note 163.

<sup>355</sup> *Id.*, p. 184.

<sup>356</sup> *Lietuvos TSR Santuokos ir Šeimos Kodekso Komentaras*, Vilnius: Mintis, 1985, p. 25. [*Commentary of Soviet Lithuanian Republic Marriage and Family Code*, Vilnius: Mintis, 1985].

<sup>357</sup> Lithuanian Civil Code. Art. 3.13.

marriage while in the state of alcoholic or narcotic insobriety, or is suffering from exacerbation of mental illness.

The principle of voluntary marriage exists in the laws of other states. For example, a free will criterion is indicated in the Russian Federation's Statute book of Family. This criterion requires a mutual voluntary acceptance by male and female to allow for a valid marriage.

Under French Family law, both parties must freely consent to the marriage. Where there is lack of consent, the marriage may be set aside on the grounds of fear, duress or mistake<sup>358</sup>.

In Sweden in order to marry, each party must, separately, in response to the question put to them by the person solemnising the marriage, declare his consent to the marriage<sup>359</sup>.

The free will of the person, who wants to conclude the marriage with another particular person, must be shown directly, i.e. the person, who wants to conclude the marriage, must personally express his/her free will. Realization of this condition is very important as this enables the civil registry officer to ascertain the free will of the couple. So this criterion secures the personal possibility to show one's own free will and to marry an independently chosen person of opposite sex; this condition also prevents constraint of the individual will.

## B. THE VOLUNTARY MARRIAGE AS THE MAIN CHURCH REQUIREMENT FOR THE VALID MARRIAGE

Under Canon law, the right to conclude a valid marriage belongs to both males and females, who are christened and show their free acceptance. "Free will acceptance" means:

They are not forced to marry;

There are no natural or Canon law barriers<sup>360</sup>.

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<sup>358</sup> HAMILTON, H. and PERRY, A., *Family Law in Europe*, London: Butterworths, 1995, p. 129.

<sup>359</sup> *Id.*, p. 477.

<sup>360</sup> CORIDEN, *supra* note 193.

The mutual voluntary consent of male and female is a necessary criterion: “to conclude a valid marriage”<sup>361</sup> according to the Church. No valid marriage can be concluded if mutual voluntary consent is absent.

The Charter of Family Rights provides the Church’s position on spouses’ free will for concluding a marriage, where the following is emphasised: “family is based on marriage, as an intimate union between male and female; marriage concluded by a voluntary criterion, ties a male and female for the rest of their life”. The second Article of the Charter of Family Rights states that marriage can not be concluded without voluntary and free will acceptance of both spouses<sup>362</sup> and it invites to respect the children’s decisions and to prevent the constraints that violate their right to choose a beloved person as a future spouse.

According to the Church teaching, the marriage contract is “a free action of humans, when the engaged persons give and take lives to each other their future”<sup>363</sup>. The requirement of free will must be a free act of both sides, without fear and constraint<sup>364</sup>. Other human power cannot affect this requirement<sup>365</sup>. Failure to follow the principle of free will causes invalidity of the marriage. If this criterion is absent the Church court can authorize an annulment and declare the marriage void, meaning there is no marriage between the persons. In this case, both partners are unwed, and they can marry another partner<sup>366</sup>.

## VI. SPOUSES’ AGE OF CONSENT ACCORDING TO THE CIVIL AND THE CANON LAW

The age of consent has been an important rule regarding valid conclusion of marriage throughout history. In the alliance of two persons by marriage, the age of consent has always been linked with a person’s sex, and the different roles between sexes. When the age of consent is established to females, the main criterion to follow is motherhood

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<sup>361</sup> CORIDEN, *supra* note 193, p. 1057, § 1.

<sup>362</sup> *Šventojo Sosto Šeimos Teisių Chartija*, Vilnius: Katechetikos Komisijos leidykla, 1992, p. 2. [Holy Throne Charter of Family Rights, Vilnius: Publishing House of the Catechetic Commission, 1992].

<sup>363</sup> CORIDEN, *supra* note 193, p. 1057, § 2.

<sup>364</sup> *Id.*, p. 1103.

<sup>365</sup> *Id.*, p. 1057.

<sup>366</sup> *Id.*, p. 1071.

function. The age of consent for males depends on their physical, sexual and intelligent maturity<sup>367</sup>.

The female age of consent was 12 years, according to the First (1529) and the Second (1566) Statute books of Lithuania. Under the influence of Canon law, the Third statute book of Lithuania (1588) changed age of consent for the females to 13 years, while the male's age of consent was 18 years<sup>368</sup>.

According to the Russian Empire's Statute book, the age of consent for males was 15 and for females 12 – 13 years; this law existed until the 19th century. On June 18<sup>th</sup>, 1830, the Statute book of Russian Empire was modified and the age of consent became 16 years for females and 18 years for males<sup>369</sup>.

When the Russian Empire occupied Lithuania, the emperor of the Russian Empire wrote an order of March 22<sup>nd</sup>, 1835<sup>370</sup> and modifying the age of consent once again, for females it became 16 years and for males - 18 years. In Lithuania Christians were allowed to conclude their valid marriage according to the regulations of their Church. The Orthodox Church allowed making valid marriage for males at the youngest age of 18 years, and for females - 16 years. People older than 80 years were not allowed by this law to marry legitimately. Males aged 17 and half years old, and females aged 16 and half years old were allowed to marry legitimately, but only if the priest granted them the permission to marry. According to the first part of Chapter X of Russian Empire's Statute book, the age of consent was different to the age of adulthood, so if the spouses were younger than 21 years, they had limited capability, and their parents or guardians had to take care of them<sup>371</sup>.

In 1940 Lithuania was occupied by the Soviet Union. On November 18<sup>th</sup>, 1940 the Soviet Union Code of Marriage, Family and Custody came into force „for a temporary period, until the confederate Family code is legislated“<sup>372</sup>. Under the Soviet Union Code of Marriage, Family and Custody spouses marry by registering their marriage at the Civil

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<sup>367</sup> ANDRIULIS, *supra* note 162, pp. 23-28.

<sup>368</sup> *Id.*

<sup>369</sup> VLADIMIRSKIJ – BUDANOV, M., *Obzor Istorii Russkogo Prava*, Moskva: Izd. 6-oe. SPb, 1909, pp. 416-417.

<sup>370</sup> *Polnoje Sobranie Zakonov Rossidkoj Impierii*, Moskva: SPB, 1835, p. 175. [Full Compendium of Russian Law, Moskva: SPB, 1835].

<sup>371</sup> ANDRIULIS, *supra* note 163, pp. 27-29.

<sup>372</sup> LTSR Aukščiausiosios Tarybos Žinios, Vilnius: Lietuvos TSR Aukščiausiosios Tarybos Prezidiumo leidykla, 1941. [The News of the Supreme Council of the LSSR, Vilnius: the Supreme Council of the LSSR Press, 1941].

Registry offices. According to this Code<sup>373</sup>, the age of consent was changed to 18 years for both males and females. The presidiums of towns or districts councils could reduce the age of consent for females by one year. Marriages were not valid if the spouses' age was younger than the age of consent was not reduced. The Soviet Union Code of Marriage, Family and Custody was valid in the Soviet Republic of Lithuania until October 1<sup>st</sup>, 1968, when the Soviet Union published an updated version of the Code of Marriage and Family law. According to this Code, a valid marriage had to be concluded in the Civil Registry offices of the Soviet Union, and only such marriage gave rise to the rights and the duties of spouses. According to this Code, the age of consent for engaged persons was 18 years. Also, this Code provided the right to any state of the Soviet Union to reduce the age of consent by two years<sup>374</sup>.

The Lithuanian Soviet Republic Code of Marriage and Family, which came into force on January 1<sup>st</sup>, 1970 (and which on May 11<sup>th</sup>, 1990 was renamed as the Lithuanian Republic Code of Marriage and Family) provided the age of consent for engaged persons to be 18 years.

The current CC stipulates that the age of consent to be 18 years for both males and females<sup>375</sup>.

The authors on family law think that the age of consent depends on social, mental and physical maturity (which comes on reaching adulthood). Other motives mentioned are social hygiene, laws, maturity and the engaged couples' ability to fulfil all the necessary actions to marry. A juvenile's physical and psychological maturity puts an end to the parents' rights over the juvenile, and this juvenile can live the life of a legally able person. The physical maturity of females for motherhood is a significant factor, for her and her children's health. Early motherhood is a big danger for the health of the female and her children<sup>376</sup>.

All countries require a minimum age to marry. However, the age of consent rises and falls throughout history, with fluctuations from 12 years of age for females to 21 years of age for males. The difference in the age of consent can be explained by the different

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<sup>373</sup> Family Code. Soviet Union Code of Conjugalinity, Family and Custody. Moskva: Izd. SPb, 1954. Art. 5.

<sup>374</sup> *Id.*, Art. 10.

<sup>375</sup> Lithuanian Civil Code. Art. 3.14.

<sup>376</sup> KUDINAVIČIŪTĖ – MICHAILOVIENĖ, I., "Santuokinis Amžius – Santuokos Sudarymo Sąlyga", *Jurisprudencija*, 2004 (47), 86- 88. [KUDINAVIČIŪTĖ – MICHAILOVIENĖ, I., "The Age of Consent – the Request of Valid Conjugalinity", *Jurisprudencija*, 2004 (47), 86- 88].

position of the Church and the State.

## A. AGE OF CONSENT OF SPOUSES IN THE VIEW OF CIVIL LAW

The age of consent, as a principle condition to conclude a valid marriage, is also emphasized in international laws: Article 12 of the European Convention of Human Rights and Liberties<sup>377</sup> states “males and females, who have reached the age of consent, have the right for a valid marriage and family, according to the law of any state, which regulates this right”; Article 16 of the Declaration of Human Rights<sup>378</sup> states “males and females of mature age have the right to conclude a valid marriage and family, without the confines of their religion or nationality”; the second part of Article 16 of the Convention of cancelling all forms of females’ discrimination states “the engagement and marriage of any child, has no juridical power and all necessary means including juridical means must be used to set the minimal age of consent ...”. The second part of Article 83 of the Convention “Marriage permission, minimal age of consent and marriage registration” states<sup>379</sup> “The member states of this Convention must set the minimal age level of consent by law”.

Under the Lithuanian Republic civil law, people who are younger than 18 years of age, have the right to conclude their valid marriage. However, people younger than 18 years old wanting to marry legitimately must apply to the Lithuanian Republic Court. If their application is successful the age of consent can be reduced by a maximum of two years. In this case, when a girl is pregnant the court can issue a permit to conclude a valid marriage to a person younger than 16 years. When the court reduces the permissible age, the parents or guardians of the juvenile must express their consent and opinion of the marriage. The court must also reduce the permissible age by checking the mental condition of the juvenile, his/her financial condition and other reasons, which can influence the reduction of the age of consent. The court’s decision on changing the age of consent must take into account the views expressed by the State Service for Protection of Children’s Rights. A marriage permit, issued to a person under the age of 18 years, according to Article 2.5 of the Lithuanian Republic CC, grants full juridical ability upon registration of

<sup>377</sup> Europos Žmogaus Teisių ir Pagrindinių Laisvių Apsaugos Konvencija. Vilnius: V. Ž., 1995, pp. 40–43. [European Convention of Main Human Rights and Liberties. Vilnius: V.Z., 1995].

<sup>378</sup> 1948 Visuotinė Žmogaus Teisių Deklaracija. Vilnius: Lietuvos Žmogaus Teisių Centras, 2000. [1948 Declaration of Human Rights. Vilnius: Lithuanian Centre of Human Rights, 2000].

<sup>379</sup> *Id.*, Art. 83.



the marriage. If the marriage is annulled, the juvenile does not lose his/her full legal capacity. There is no maximum age of consent and the difference in age between spouses is not relevant to conclude a valid marriage.

According to the third part of Article 3.14 of the Lithuanian Republic CC, pregnancy can allow for a valid marriage of a future spouse, even if the female is younger than 16 years old. The third part of Article 3.14 of the Lithuanian Republic CC is under criticism because the lowest age limit of consent is not specified for making a valid marriage in the Lithuanian Republic. Canon law is more particular, according to the 1083 canon: “males younger than 16 years of age and females younger than 14 years of age cannot conclude a valid marriage”. The Civil Code of Lithuanian Republic lacks this specificity. The conclusion of the marriage can be made, that people older than 14 years can marry legitimately according to Article 2.7 of the Lithuanian Republic CC. Parents or guardians of the juveniles younger than 14 can conclude the marriage contract. In this case the third part of Article 3.14 of the Lithuanian Republic CC must be updated: in the case of pregnancy, the court can issue a permit for valid marriage to the person not younger than 14 years of age.

## B. THE CHURCH POSITION ON THE AGE OF CONSENT FOR THE SPOUSES

The Church position on the age of consent is expressed in 1 § of 1083 canon of CIC 1983<sup>380</sup>. According to the second paragraph of the same canon, a conference of bishops has the right to increase the age of consent. The Lithuanian conference of bishops decided to accept the age of consent, as indicated in the Lithuanian Republic Civil Code and international laws. Thus, only adult people (who are at least 18 years old), can conclude a valid marriage before the Catholic Church in Lithuania. Juveniles, wishing to conclude their valid marriage, firstly must obtain a marriage permit from the court, and, secondly, must get the bishop's permit for their marriage. The priest, registering and documenting the marriage, provides the bishop with the juvenile's marriage application. However, the Church makes some exceptions for the permissible age, whereby males

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<sup>380</sup> Under this canon a man before he has completed his sixteenth year of age, and likewise a woman before she has completed her fourteenth year of age, cannot enter a valid marriage.

wanting to marry legitimately must be at least 16 years old and females must be 14 years old<sup>381</sup>.

The age of consent, as a barrier of Canon law, only binds Christians, so the Church's regulated age of consent is not a barrier for people who have not been christened. Furthermore, not being of age is only the temporal barrier, according to Canon and civil law.

A marriage concluded by spouses who are not adults will become invalid; therefore, the marriage must be reopened according to canon law No. 1156 – 1158 of the Canon law of 1983 and then becomes valid.

The requirement of age to conclude a valid marriage is stipulated in the first paragraph of canon 1071: "nobody can conclude the marriage of a juvenile without the permit of a local Ordinary, when the parents do not know about the marriage, or they have a negative attitude towards the marriage". According to the Church, the number of juvenile marriages is increasing. However, in Lithuania the majority of such marriages do not last. So, modern Canon law defines the marriage of juveniles, according to the pastoral Constitution of the second Vatican assembly "*Gaudium et spes*" n. 52, 1: "The duty of the spouses' parents or guardians is to help them create a successful family, but the parents or guardians cannot use constraint to force the spouses". Arguments against the marriage from the parents or guardians of the spouses are evaluated by the priest. The priest can seek advice from the local Ordinary, but if the local Ordinary makes a decision the priest must follow it. The Church's view of juvenile marriage is described in canon No. 1072; the priests must try and persuade the spouses not to marry, when they are too young.

### C. REQUIREMENTS FOR SPOUSES' AGE IN OTHER COUNTRIES

The requirement of spouses' age is similar in many countries around the world<sup>382</sup>. For example, in the USA, in the State of New York, a couple planning to marry must get a permit from the court. If the spouses are younger than 14 years, the court cannot give them

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<sup>381</sup> Canon 1083 § 1.

<sup>382</sup> There are some variations across the different countries regarding anyone under 18 years of age who is planning to wed. For the purpose of comparison were selected European Union countries and for almost the same situation- the USA.

a permit to conclude a valid marriage<sup>383</sup>. If the future spouse is 14 or 15 years old, he/she must show written consent from his/her parents or guardians for the marriage, the future spouse must also apply to the Family or the Superior Court. After a successful application the couple has the right to marry. If both engaged persons are 16 or 17 years old, they must also prove to the court that they have their parents' or guardians' consent for marriage. The written consent of parents or guardians for marriage is not required when engaged persons are 18 or more year old<sup>384</sup>.

The Civil Code of Italy states "juveniles can not create a valid marriage"<sup>385</sup>, the minimum age of consent is 16 years. This means "if there are crucial reasons for a marriage, the court must explore the physical and mental maturity of the juvenile, hear the parents' opinion about the marriage and only after hearing this evidence can the court grant a marriage permit to a person older than 16 years of age". Juvenile engaged persons are assigned a tutor to help them. A tutor must be of adult age. If both spouses are juveniles, the court can assign them a special tutor, normally one of the parents.

In Denmark Act No 256 of June 4<sup>th</sup>, 1969, with subsequent amendments, makes provision for the formation of marriage (Marriage Act 1). The parties to a marriage must have the capacity to marry and comply with certain formalities. Breach of these requirements may provide grounds for nullity of marriage. One of these requirements is age: the parties must be over the age of 18 and not declared incapable. Both parties must be at least 18 years old at the time of marriage, but a person under this age can marry with parental consent and with the special permission of the country governor<sup>386</sup>.

The Irish family act (1995), defines the age of 18 years as the minimum age of consent for valid marriage. Since August 1<sup>st</sup>, 1996 engaged persons must inform the Registry office three months prior their marriage<sup>387</sup>.

In England and Wales the parties must be over the age of 16. A person aged 16 to 18 can only marry with the consent of a parent or other persons with parental responsibility, but where consent is not forthcoming, the court can authorise the marriage

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<sup>383</sup> The same situation exists and in Lithuania.

<sup>384</sup> *Getting Married in New York State*, <http://www.health.state.ny.us/nysdoh/consumer/vr/married.htm>, (last visited Apr. 26, 2013).

<sup>385</sup> *Italian Civil Code and Complementary Legislation*, translated by LONGO, M., New York: Ocean Publications, 1993.

<sup>386</sup> HAMILTON, *supra* note 358, p. 35.

<sup>387</sup> *Rules for Getting Married in Ireland*, <http://www.irishweddingsonline.com/GettingMarried.htm>, (last visited Oct. 20, 2013).

to take place<sup>388</sup>.

If one or both spouses are younger than 18 years of age, or the couple cannot wait three months, the couple can apply to the court seeking permission to marry. Applications of this type usually go to the Family Court, or to the Superior Court, according to the residence of applicants. If the court rejects the permit for marriage, people of less than 18 years of age cannot conclude a legal marriage<sup>389</sup>.

Under the Croatian Marriage and Family Relationships Act of July 14<sup>th</sup>, 2003, marriage may be contracted by the persons, who have reached the age of 18 years at the time of the marriage (Article 26(1)). A competent court may authorise the person, who has reached sixteen years of age to marry if it can establish that the person has acquired the physical maturity necessary for assuming the rights and duties associated with marriage (Article 26(2)). Before taking its decision the court may hear the minor, who has made the application and his or her parents or guardians.

With regard to minimum ages for spouses, the regular German minimum age is 18 years old<sup>390</sup>, with possible exceptions from the age of 16. A minimum age below that level would violate German public order<sup>391</sup>.

Under Belgian Civil Code, the parties must have the capacity to marry and must comply with legal formalities. The parties must be at least 18 years old (art. 144 Belgian Civil Code). Special dispensation to marry below these ages can be given by the juvenile court (art. 145 Belgian Civil Code)<sup>392</sup>.

It can be concluded that the age of consent for spouses in EU members countries is similar to that in the Lithuanian Republic: the age of consent for spouses is 18 years. People younger than 18 years of age must have the written consent of their parents' or guardians' for marriage, however, this does not apply if the female is pregnant. Such a couple planning to marry must get a permit from the court.

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<sup>388</sup> HAMILTON, *supra* note 358, p. 4.

<sup>389</sup> *Id.*, p. 4.

<sup>390</sup> §1303 BGB (Bürgerliches Gesetzbuch applicable since January 1, 1900).

<sup>391</sup> German Case. OLG Köln NJWE-FER, 1997, p. 55.

<sup>392</sup> HAMILTON, *supra* note 358, p. 4.

#### D. THE DIFFERENCE AND PROBLEMS OF EVALUATING THE AGE OF CONSENT BETWEEN CANON AND CIVIL LAW

As mentioned above, people of at least 18 years old can marry legitimately according to canon or civil law and, if permitted, can marry under the age of 18 years. However, according to church law, people under the age of 18, engaging in marriage, may encounter problems, as they require a marriage permit from the court as well as the church bishop.

Thus, in this situation, the under-age couple, married in the church, needs to wait until the juvenile turns 18 years old, and only then their marriage can be registered at the Civil Registry office. We argue there is not a good reason for this partial disrespect and this anomaly should go. According to the second part of Article 3.24 of the LR CC, validating a marriage through the Church generates similar consequences as a marriage concluded in the Civil Registry offices. This is only if the marriage reservations of Articles 3.12 – 3.17 are not infringed. However, if an infringement of Article 3.14 occurs, the age of consent can only be adjudicated by a court of law. The above mentioned article should be amended and church law should have the right to solve the question of age and of the reduction of age of engaged persons. In this case, the double disquisition of the question could be avoided, therefore making the registration procedure simpler.

Here is an example of the problems related the age of consent to conclude a valid marriage in the Lithuanian Republic. A couple M.K. and A.S. married legitimately through their church parish, according to church law. However, on registering their marriage at the Civil Registry office<sup>393</sup>, the officer saw the bride was a juvenile. With this respect the officer informed the couple to apply to the local court for a permit to register their marriage. The court rejected their application for marriage on the ground that the couple had already married, and a new permit for marriage could not be given<sup>394</sup>.

To sum up, the Church is known to have a very hard stance on the marriage of juveniles and, according to Canon law, parents or guardians with an opposing opinion of a juvenile's marriage hold legal power. However, according to civil law, the consent of

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<sup>393</sup> According to the Lithuanian Republic's Civil Code, the Church's conjugality must be registered in the same town's, where the conjugality was made, Civil Registry office within 10 days.

<sup>394</sup> Lithuanian case. M. Kamaitytė and A. Stankevičius v Civil Registry, 2 A - 1608 (A.C. C. 2002).

parents or guardians is not necessary for a juvenile to marry legitimately. According to Article 3.14 of the LR CC, parents and guardians can announce their opinion of the marriage to the court. On the court's adjudication for juvenile marriage, the couple's possession of property is the main substantial argument taken into account; this type of argument is not important to the Church and is not indicated in the canon law code.

## VII. INTERNATIONAL MARRIAGES REQUIREMENTS

An international marriage joins two people from different countries and cultural backgrounds<sup>395</sup>. Couples of international marriages must define where home is – in his country, in her country, or in another country altogether – and strike the right balance in blending the traditions of both parties, even for cultural matters or matters such as what the couple eats on a daily basis<sup>396</sup>.

The elements of the establishment of international marriage shall be governed by the law of the nationality of each party and the formalities of marriage by the law of the place where the marriage occurs or the law of the nationality of one of the parties, provided that a marriage between a Lithuanian and a foreign national taking place in Lithuania shall be governed by the laws of the Republic of Lithuania. For a marriage to be legally acknowledged, it should satisfy certain requirements stipulated by law. The above-indicated 'certain requirements' refers to elements of marriage such as the parties' will to marry and eligible age as well as formalities of marriage such as the marriage report.

As one or both of the people involved in an international marriage live outside their home country, the couple must invariably contend with legal issues-besides the evident visa or immigration issues.

When we look at the questions of laws governing mixed marriage and the international marriages in general, we find conflict rules.

According to the Article 1.24, 1 § of Lithuanian Civil Code a promise to marry and its legal effects shall be governed by the law of the state of domicile of the parties to

<sup>395</sup> *What is International Marriage?* eHow.com [http://www.ehow.com/facts\\_6722709\\_international-marriage\\_.html#ixzz1JgeOnd6p](http://www.ehow.com/facts_6722709_international-marriage_.html#ixzz1JgeOnd6p), (last visited Apr. 16, 2013).

<sup>396</sup> NATALI, M., *International Marriages*, [http://www.transitionsabroad.com/publications/magazine/0107/international\\_marriages.shtml](http://www.transitionsabroad.com/publications/magazine/0107/international_marriages.shtml), (last visited Apr. 16, 2013).

the promise. Where the parties to the promise of marriage are domiciled in different states, the promise of marriage and its legal effects shall be governed by the law of the place where the promise was made, or by the law of the State of domicile of one of the parties, or by the law of the state of citizenship of one of the parties, whichever law is most closely related with the dispute<sup>397</sup>.

Matrimonial capacity and other conditions to contract marriage in respect of foreign citizens and stateless persons without a Lithuanian domicile may be determined by the law of the State of domicile of both persons intending to marry if such marriage is recognized in the State of domicile of either of them<sup>398</sup>. Matrimonial capacity and other conditions to contract marriage shall be governed by the law of the Republic of Lithuania<sup>399</sup>.

As to conclusion of a marriage with a foreign element inside Lithuania: Civil Registration Bureaus of the Republic of Lithuania shall have jurisdiction to perform the registration of marriage if either of the persons intending to marry is domiciled in the Republic of Lithuania or is a Lithuanian citizen at the time of solemnization of the marriage<sup>400</sup>.

Individuals wishing to get married in Lithuania need to fill out the required forms and submit them along with their passport, birth certificate, and required documents<sup>401</sup> to the Civil Registry office.

If a foreign citizen has never been married, proving that he or she is “free to marry”, originating certificate from his or her last state of residence. This is a proof of celibacy. This document must have an apostille attached to it.

Previously divorced persons must present a certified copy of their divorce decree. Widows and widowers must present a death certificate for the deceased spouse.

No medical examination or statement is required<sup>402</sup>.

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<sup>397</sup> Lithuanian Civil Code. Art. 1.24; 2 §.

<sup>398</sup> *Id.*, Art. 1.25; 3 §.

<sup>399</sup> *Id.*, Art. 1.25; 1 §.

<sup>400</sup> *Id.*, Art. 1.25; 2 §.

<sup>401</sup> In Order to get the marriage certificate in Lithuania, following documents must be submitted: passports or identity cards, birth certificates, former partner's death certificate or certificates proving or annulling/terminating, a marriage/civil partnership (if previously married). If any of the partners is alien, documents to be submitted are as follows: passport or identity cards (translated into the Lithuanian language), birth certificates (legalized according to the established procedures and translated into Lithuanian language), document proving person's right to get married, issued by the competent institution of the country of origin (legalized according to the established procedure and translated into the Lithuanian language).

<sup>402</sup> Under Art. 3.21 at the time of filing an application to register a marriage, the officials of the Register

Once the above documents have been certified, they must be submitted, along with passports, to the Civil Registry. Applicants complete local forms and pay the fee for the service to the Civil Registry Office. A 30-day waiting period is required, after which the couple returns to the Registry to sign and receive the marriage certificate. The waiting period can be shortened only in exceptional circumstances.

As to foreign documents, in Lithuania birth, marriage and death certificates are issued by the Civil Registry offices under the authorization of the Ministry of Justice<sup>403</sup>. The rules setting out the procedures for the issuance of these documents are approved by Minister of Justice of the Republic of Lithuania.

In Lithuania there is no general requirement to register birth, death or marriage which occurred abroad. They have only got to be registered if birth, death or marriage occurred in Lithuania according to the Civil Metrication Rules (Minister's of Justice order No. 1R- 160 (19th March 2006). This means that there is no need for foreign civil status documents to be registered. Nevertheless, there might be such requirement in particular circumstances, for instance, when alien wants to register marriage in Lithuania he must submit the following documents: a valid passport, birth certificate, divorce certificate (if divorced) or death certificate of spouse (if a widow/widower), a document issued by a competent authority of his/her country certifying that there are no obstacles to contracting a marriage, a receipt of payment. These foreign documents (except for the passport and receipts of payments made) must be translated into the Lithuanian language and legalized according to the established procedure (if not otherwise provided for by international agreements concluded by the country of origin and the Republic of Lithuania). Foreign nationals must contact a competent body of their country for legalization of documents<sup>404</sup>.

There in Lithuania is no general requirement to register a marriage entered into abroad. However, to keep his civil status up to date, a person can register his marriage in Lithuania: marriages of nationals of the Republic of Lithuania registered by institutions of a foreign state are entered into the records of the Civil Registry office of their place of

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Office shall suggest to the intended spouses that they undergo a premarital medical examination and prior to the date of the registration of their marriage submit a doctor's certificate drawn up in the form specified by the institution authorised by the Government. Failure to submit a doctor's certificate shall not be an impediment for the registration of the marriage.

<sup>403</sup> Lithuanian Civil Code. Art. 3.281.

<sup>404</sup> SAPOKAITE, I., *Legalisation of Public Documents within the EU Member States*, British Institute of International and Comparative Law,

[http://ec.europa.eu/civiljustice/news/docs/study\\_public\\_docs\\_lithuania.pdf](http://ec.europa.eu/civiljustice/news/docs/study_public_docs_lithuania.pdf), (last visited Dec. 16, 2013).



residence in the Republic of Lithuania. Thus a marriage record entry is made and a marriage certificate is subsequently issued. Marriages of nationals without permanent residence in the Republic of Lithuania are entered by the Civil Registry Office of the City of Vilnius.

The following documents must be submitted for entry of such marriages originally concluded and registered in a foreign state: a copy of the marriage certificate issued by a foreign institution, certified by a notary public, translated into the Lithuanian language and legalized (if not provided for otherwise by international agreements between the country of origin and the Republic of Lithuania); valid passports or identity cards of citizens of the Republic of Lithuania, a passport of the foreign nationals involved or copies thereof certified by a notary public; a receipt of payment<sup>405</sup>.

An application for a marriage to be entered must be submitted to the Civil Registry office. Citizens living abroad may submit their application to enter marriage into the records through a diplomatic mission or consular post of the Republic of Lithuania abroad.

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<sup>405</sup> SAPOKAITE, *supra* note, 404.

## ***Chapter 2***

### ***The Catholic Church and the State attitudes to spouses' personal rights and duties***

Marriage law has traditionally laid down the legal rights and duties of spouses in terms of property, power and authority within wedlock. Progressively, over the Second World War period, national law and practice have been adopted to take account of changing attitudes towards equality between women and men within the marital relationship. As average age at marriage has been rising, and equal rights have been moved onto the agenda at EU<sup>406</sup> and national level, the legal age of marriage for women has progressively been aligned with that for men at 18, while allowing for marriage at a younger age with parental consent. Across the Union, marriage no longer constitutes a formal bar to women's employment, and marriage law often stipulates that husbands cannot prevent their wives from entering paid work outside the home, from opening their own bank account or owning property<sup>407</sup>.

By law, spouses have equal rights and duties within marriage, even if some religious ceremonies still retain references to the duty of the wife to obey. Whether or not they marry in a church, couples are expected to live together, to be faithful to one another and to provide mutual support and assistance.

#### **I. THE STATE ATTITUDE TO SPOUSES' PERSONAL RIGHTS AND DUTIES**

The State's attitude to spouses' personal rights and duties is expressed in the Constitution and Civil Code<sup>408</sup> of the Republic of Lithuania.

In the family, the rights of spouses shall be equal. The right and duty of parents is to bring up their children to be honest people and good citizens and to support them until

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<sup>406</sup> Under European Convention on Human Rights Article 5 of Protocol 7 spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.

<sup>407</sup> HANTRAIS, L., *Family Policy Matters— Responding to Family Change in Europe*, Bristol: The Policy Press, 2004, p. 104.

<sup>408</sup> Lithuanian Constitution. Art. 3.26-3.36.

they come of age. The duty of children is to respect their parents, to take care of them in their old age, and to preserve their heritage<sup>409</sup>.

Under Article 3.26 of Lithuanian Civil Code having concluded a marriage, the spouses acquire certain rights and duties. Spouses shall have equal rights and equal civil liability in respect of each other and their children in matters related to the formation, duration and termination of their marriage. Spouses may not waive, by mutual agreement, their rights or extinguish their duties that arise from a marriage.

A general principle of the implementation family members' rights and responsibilities is formulated in Article 3.27 of Civil Code. Under this article spouses must be loyal to and respect each other; they must support each other morally and financially and contribute toward the common needs of the family or the needs of the other spouse in proportion to their respective capabilities<sup>410</sup>.

Where due to objective reasons one of the spouses is unable to make a sufficient contribution toward the common needs of the family, the other spouse must do that in accordance with his or her abilities<sup>411</sup>.

Marriage creates for spouses not only the rights and obligations, but also certain limitations and constraints. Under Article 3.29 of Civil Code marriage shall not restrict the passive and active capacity of spouses, nevertheless the possibility of the spouses to exercise certain rights may be restricted by the contract of marriage or the mandatory rules hereof.

Spouses must maintain and bring up their children of minor age, care for their education and health, ensure the child's right to personal life, inviolability of his or her personality and freedom, the child's property, social and other rights laid down in the domestic and international law<sup>412</sup>.

Limitations and constraints of spouses' rights are also related with the regulation of their personal property regime. Under Article 3.35 of Civil Code neither spouse may, without the consent of the other spouse, alienate, pledge or lease movable property used in the household or encumber the right to it in any other way. A spouse having neither consented to nor ratified such a transaction may apply to have it annulled except in cases

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<sup>409</sup> Lithuanian Constitution. Art. 38.

<sup>410</sup> Lithuanian Civil Code. Art. 3.27; 1 §.

<sup>411</sup> *Id.*, Art. 3.27; 2 §.

<sup>412</sup> *Id.*, Art. 3.30.

where the transaction was by onerous title and the third party was in good faith.

Where the spouses live in a rented dwelling under a lease agreement, the spouse in whose name the dwelling is rented may not, without a written consent of the other spouse, terminate the lease agreement before its term, sublease it or transfer the rights under the lease agreement. The spouse having neither consented nor ratified such an act may apply to have it annulled. A spouse who is the sole owner of the family dwelling may not, without a written consent of the other spouse, alienate, pledge or lease this dwelling. The spouse having neither consented to nor ratified such an act may apply to have it annulled provided that the disputed premises have registered in the public register as a family asset<sup>413</sup>.

Issues of international private law, governing personal non – property relations of spouses are regulated by CC<sup>414</sup> Article 1.27. Personal non – property relations of spouses are relations, coherent to their equal rights in resolution of all family related questions, their personal non – property rights connected with their children, their right to a surname, right to choose their place of residence, occupation, profession, mutual respect, loyalty, moral support, etc. According to this article personal relations between spouses shall be governed by the law of the state of their domicile. Personal relations between the spouses domiciled in different states shall be governed by the law of the state of their last common domicile. Where the spouses have never had a common domicile, the law applicable to their personal relations shall be the law of the state to which the personal relations between the spouses are the most closely related. Where it is not possible to determine to the law of which state the personal relations between the spouses are the most closely related, the law of the state where the marriage was solemnized shall apply<sup>415</sup>.

To sum up, the State approach to the spouses' personal rights and duties, formulated in the legal acts and norms, is modern and parallel in legal systems of all the EU member states.

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<sup>413</sup> Lithuanian Civil Code. Art. 3.36.

<sup>414</sup> *Id.*, Art. 1.27.

<sup>415</sup> *Id.*, Art. 1.27, 2 §.

## II. THE ATTITUDE OF CATHOLIC CHURCH TO SPOUSES' PERSONAL RIGHTS AND DUTIES

Christian marriage, present in all times and in all cultures, "is in reality something wisely and providently instituted by God the Creator with a view to carrying out his loving plan in human beings". Thus, husband and wife, through the reciprocal gift of themselves to the other – something which is proper and exclusive to them – bring about that communion of persons by whom they perfect each other, so as to cooperate with God in the procreation and raising of new lives<sup>416</sup>. In the fruitfulness of married love, man and woman "make it clear that at the origin of their spousal life there is a genuine 'yes', which is pronounced and truly lived in reciprocity, remaining ever open to life"... Natural law, which is at the root of the recognition of true equality between persons and peoples, deserves to be recognized as the source that inspires the relationship between the spouses in their responsibility for begetting children. The transmission of life is inscribed in nature and its laws stand as an unwritten norm to which all must refer<sup>417</sup>.

Marriage is rooted "in the natural complementarity that exists between man and woman, and is nurtured through the personal willingness of the spouses to share their entire life", what they have and what they are: for this reason such communion is the fruit and the sign of a profoundly human need<sup>418</sup>.

The valid celebration of matrimony entails the duty (at least intersubjectively<sup>419</sup> to establish and develop married life, because married life is the object of the mutual rights and obligations of the spouses. Canon 1151 sanctions this by stating "Spouses have the obligation and the right to maintain their common conjugal life." Nevertheless, canon 1151 authorizes spouses to suspend cohabitation if "a lawful reason excuses them."

The right duty of physical cohabitation stated in canon 1151 should not be confused with the right to common conjugal life. The right to common conjugal life is the juridical situation of solidarity and of shared assets, social condition, etc., between the

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<sup>416</sup> PAUL VI, *Encyclical Letter Humanae Vitae*, Roma: Liturgical Press, 1968, pp. 485-486.

<sup>417</sup> BENEDICT XVI, *Address to the Participants in the International Congress organized by the Pontifical Lateran University on the 40th Anniversary of the Encyclical Humanae vitae*, 10 May 2008, p. 1; cf. John XXIII, *Encyclical Letter Mater et magistra* (15 May 1961), III: AAS 53 (1961), 447. Rome: L'Osservatore Romano, 2008, p. 447.

<sup>418</sup> JOHN PAUL II, *Apostolic Adoration: Familiaris Consortio*, Lumen: Liturgical Press, 1994, pp. 101-102.

<sup>419</sup> The difference between institutional and intersubjective duties, HERVADA, C., *Obligaciones Esenciales del Matrimonio*, Pamplona: Universidad de Navarra, 1991, pp. 63.

spouses. The right duty to cohabitation adds to the common conjugal life the specific fact of common life, since cohabitation is a natural consequence of the *ius in corpus* and common conjugal life. In this sense, cohabitation is the immediate operative principle for satisfactory fulfillment or exercise of the right duty to the conjugal act and to common conjugal life. The right duty to establish and maintain marital cohabitation is not the right-duty to common conjugal life, but a consequence of it. Undoubtedly, conjugal common life can exist with a very limited de facto shared matrimonial life, as in the case of immigrants, exiled persons, incarcerated persons, and persons hospitalized due to serious mental illness.

The duty and the right to establish and maintain conjugal cohabitation are subject to the vicissitudes of real life. However, as indicated in canon 1151, any separation must be due to a lawful cause. Thus, matrimony always implies a relationship of cohabitation, but not necessarily a situation of cohabitation<sup>420</sup>.

Once matrimony takes place, a complex combination of interwoven interests is established between the spouses (individual, family, social, economic, spiritual, emotional, religious, etc.), and these interests develop, coincide, and unfold from the immediate cohabitation of the spouses. According to Hervada<sup>421</sup>, this living together is informed by a series of informing principles that constitute the general guidelines for spousal behaviour. These principles are different from the conjugal rights and obligations, to which they give direction and meaning.

There are five of these informing principles:

1) Spouses must guard their fidelity. Conjugal fidelity is not only the fruit of a conjugal right-duty, but includes the demand to be "one flesh."

2) Spouses must tend to their mutual material or corporal perfection. This rule implies that spouses must help each other in the maintenance and improvement of the material aspects of their personal life. It also refers to the fact that matrimonial life must not involve a detriment to the corporal or material good of the other spouse.

3) Spouses must tend to their mutual spiritual perfection. This implies that spouses must help each other in the maintenance and improvement of their emotional, moral and religious life. One spouse must not cause the other any detriment to his or her spiritual well being.

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<sup>420</sup> IVARS, J., *Exegetical Commentary Code of Canon Law*, Woodridge: Midwest Theological Forum, 2004, pp. 123-132.

<sup>421</sup> HERVADA, *supra* note 419, p. 24.

4) Spouses must live together. This is the duty of physical cohabitation, namely a shared table, bed, and dwelling.

5) Spouses must tend to the material and spiritual good of their children. This rule implies that spouses must tend to favour their dual well being in connection with their offspring. Moreover, one must not cause any harm to their material or spiritual well being, immorally or culpably.

In conclusion, it may be said that, under canon law spouses have equal personal rights and duties and at the same time they have more responsibilities and obligations than in civil law.

### III. SPOUSES' PERSONAL RIGHTS AND DUTIES IN THE COMPARATIVE FAMILY LAW

In several countries<sup>422</sup>, the law is very specific about the obligations and responsibilities of married couples. The 1918 Marriage Code applied under Soviet rule in the Central and Eastern Europe countries laid down precepts that treated women in marriage more equally than in most of Western Europe at that time.

Subsequent marriage and family law has upheld these principles. Article 61 of the Polish Family and Custody Code (1994, 1998) states, for example, that spouses have equal rights and obligations in marriage. They must live together, support each other, be faithful and work together for the good of the family they have created.

Estonian law affords another example of the binding legal requirements that marriage imposes on couples. Spouses are required to maintain a partner in need of assistance and unable to work. A husband must support his wife during pregnancy and while she is caring for a child up to the age of three, if the financial situation of the obligated spouse permits. As noted in Chapter Three, however, census enumerators in Estonia do not record a person as married unless the legal spouse is living in the same household<sup>423</sup>.

Under Swedish law spouses are considered as two independent persons but with equal rights. Spouses have a mutual duty to support each other and jointly safeguard the

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<sup>422</sup> For the purpose of comparison European Union countries were selected.

<sup>423</sup> Statistical Office of Estonia, 1999, § 39, p. 14.

interests of the family<sup>424</sup>.

Italian Constitution also guarantees the moral and legal equality of spouses (Art. 29, (2)).

In France both spouses have mutual duties to be faithful, to provide each other with help and assistance<sup>425</sup>, and to live together.

Under Portuguese law personal spouses' rights and obligations created by the marriage are those of respect, fidelity, living together, cooperation and assistance<sup>426</sup>.

In Spain husbands and wives have equal rights and duties<sup>427</sup>. These are non-negotiable so that any agreement modifying them is void. Spouses must live together, provide mutual support and assistance<sup>428</sup>, respect each other, remain faithful and must act in the interests of the family<sup>429</sup>.

The Hungarian Family Code<sup>430</sup> established the complete equality and individual rights of the spouses, (even with respect to nationality, choice of name and residence, and exercise of parental rights, in the matters of name, choice of residence, property rights and in decision making concerning children and other questions of family life. Equality of sex was made a constitutional principle in the Hungarian Constitution of 1949 Art. 67. Spouses are obliged to cooperate with one another in all matters concerning family life, including issues related to producing and raising children. Self-assertion and personal autonomy are permitted only under the condition that the 'family interest' is respected.

The legal rights and responsibilities of married couples in Hungary are also laid down in the law. They owe one another faithfulness, especially in the context of sexual relations, and mutual support, involving caring for a sick partner, encouragement in pursuing educational and career opportunities and financial assistance for a partner in need. Spouses are required to use and maintain a common residence, and develop in common property obtained during their marriage, with the exception of items belonging to the partners' own private wealth. Pursuant to the Fundamentals simply provides the Family Code in Art. 72: "Questions concerning the children's upbringing and other questions of

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<sup>424</sup> See Marriage Act 2.

<sup>425</sup> C. civ. Art. 66-68 (Fr.).

<sup>426</sup> HAMILTON, *supra* note 358, p. 335.

<sup>427</sup> This complies with the principle of non-discrimination between spouses laid down in Art. 32, CE (Spanish Constitution).

<sup>428</sup> Including financial support.

<sup>429</sup> HAMILTON, *supra* note 358, p. 448.

<sup>430</sup> The 1952 Family Code - still in force after a series of amendments.



family life shall be decided by the spouses jointly. Each of the spouses shall be free to select his occupation, profession, and place of residence." Equal rights to possess, use and dispose of joint property are established in Art. 27 Family Code and equal rights and duties between father and mother with respect to their children. Art. 77 provides that the spouses should live together, be loyal to one another, be considerate and respectful of one another and help each other. Art. 75 provides that both spouses have the duty of caring for the children and the management of the household, and Art. 32 adds the joint duty of contributing to the needs of the household<sup>431</sup>.

Men and women in the Republic of Croatia are at least formally equal in all areas, including family law matters. They enjoy the same personal rights, and decide upon mutual agreement on the first name of the mutual child and on the exercise of parental rights. In case of a dispute, the decision is rendered by the social care department. In practice, it cannot be expected that a large number of objections by citizens regarding violation of the principle of equality of spouses will be raised, with the exception of decisions on custody over children, which is mostly given to the mother<sup>432</sup>.

In Scotland the wife's duty of obedience<sup>433</sup> and the husband's right to choose the matrimonial home<sup>434</sup> have been abolished. Other duties, such as the duty to adhere to and to practice sexual fidelity, apply equally to both parties and are no more than grounds for divorce if breached. Refusal of sexual intercourse may also found an action of divorce. A husband can be guilty of raping his wife<sup>435</sup>.

It can be concluded that most national laws recognize equality of status between spouses, but the countries have not legislated or effectively acted so to be able to ensure that this equality is put into practice in the division of labour in the home. Exceptionally, the Marriage Act in Sweden does go some way towards laying down guidelines for the distribution of household labour, stating that spouses shall divide expenses and chores between them, and that both spouses, to the best of their ability, shall contribute as

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<sup>431</sup> DÓCZI, M., *Changes in the Matrimonial Property Law in Hungary*, Paris: Annual Meeting of the Research Committee of Sociology of Law, 2005, p. 65.

<sup>432</sup> Compatibility of Croatian Law with the requirements of the European Convention on Human Rights. Council of Europe H (98)13, 1998; VAN DIJK, P. and VAN HOOFF, G., *Theory and Practice of the European Convention on Human Rights*, Netherlands: Kluwer Law and Taxation Publisher, 1990, p. 443. [http://www.coe.int/t/e/human\\_rights/awareness/4\\_our\\_activities/Compatibility\\_Reports/H%2098%2013\\_compatibility\\_croatia.pdf](http://www.coe.int/t/e/human_rights/awareness/4_our_activities/Compatibility_Reports/H%2098%2013_compatibility_croatia.pdf). (last visited October 14, 2013).

<sup>433</sup> Rejected in Scottish case *Mackenzie v. Mackenzie* [1895] AC 384, 22 R 32, HL; Scottish case *Gordon v. Gordon* (1948) 64 Sh Ct Rep 53.

<sup>434</sup> Abolished by the Law Reform (Husband and Wife) (Scotland) Act 1984, s 4.

<sup>435</sup> HAMILTON, *supra* note 358, p. 406.

necessary to meeting their common and individual needs<sup>436</sup>.

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<sup>436</sup> HANTRAIS, *supra* note 407, p. 108.

### Chapter 3

#### *The Catholic Church and the State attitudes to spouses' property relations*

The marital property regime or property relationship sets out the procedure for the administration (use and disposal) of the property, and its possible restrictions in view of the other spouse's interests, the liability to creditors who are third persons, as well as rules for division of property upon termination of the proprietary relationship<sup>437</sup>. The objective of the marital property regime is - pursuant to the accentuation selected by the legislator - to balance the various, often conflicting interests: the personal interests of spouses *versus* general interests, the interests of the husband *versus* those of the wife; the interests of spouses *versus* those of third persons (creditors, successors). The world practice knows a large number of marital property regimes, which can be broadly generalized into two basic models: separate property and joint property regimes. However, these do not occur in the pure form, because the interests of the society and of the individual require a combination of the elements of both models<sup>438</sup>.

Marital property systems creating joint property rights have been regarded as characteristic of the social nature of marriage - they correspond to the understanding of marital cohabitation as a social unit, which joins together both the personal and proprietary spheres of the spouses<sup>439</sup>. The concept of community property directly relates to the notion that marriage is for life: having permanently linked their fates, spouses agree to incur each other's proprietary gains as well as losses. This shows that community property as a marital property regime does not intend to create flexible and differentiated solutions for divorce or other cases of division of joint property, but is chiefly targeted at fixing the joint liability of spouses during marriage. The great divorce rate, however, forces one to

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<sup>437</sup> Further to the provisions on marital property relationships, regulation of the obligation to maintain the family and the mutual right of representation of spouses also plays an important role in the proprietary relations of spouses. These norms are to be distinguished from the marital property regime, insofar as their content is not to define the any property rights, but rather obligations under the law of obligations, concerning which property relations are irrelevant. These obligations are also of such importance from the viewpoint of the family as a whole that they should apply as perceptive norms to any arrangement of the proprietary relations of spouses, so that the possibility to deviate from these under a marital property contract would be quite limited.

<sup>438</sup> HEGNAUER, C. and BREITSCHMID, P., *Grundriss des Eherechts*, Bern: Stämpfli Verlag, 1993, p. 209; HOHLOCH, G., *Die Entwicklung des Deutschen Familienrechts im Europäischen und Internationalen Zusammenhang – Brennpunkte des Familienrechts*, Berlin: Rechtspraxis, 1998, pp. 108.

<sup>439</sup> See the preamble of the ESSR Marriage and Family Code (adopted on 31.07.1969): "The Soviet marriage and family legislation shall actively contribute to the final clearance of family relations of economic considerations".

consider the need to arrange the division of joint proprietary rights in an adequately efficient manner while having regard to the reasoned interests of both parties ultimately, also with a view to a just distribution upon termination.

In many traditional communities<sup>440</sup> property relations and their regulation used to be very important in the engagement period. In some cultures a woman's family gave a dowry to her future husband and the choice of a bride depended on the value of this dowry. In other cultures, for example in the Asia, a huge amount of money was given to the bride's parents as a bride price<sup>441</sup>.

In Islam law a mahr<sup>442</sup> is typically specified in the marriage contract signed during an Islamic marriage. Mahr (also spelled Maher, Mohr and Mehr) is a Muslim tradition in which an agreement is entered into prior to marriage concerning a sum of money that a groom promises to pay his bride in the event of a marriage breakdown or death<sup>443</sup>.

In various cultures these customs are still being employed and they are a part of the marriage contract. So in some cultures the bride's parents give a part of their wealth as a dowry. The habits of giving a dowry are similar in several countries, for example in Greece, Egypt, India and China. In other cultures the category of wife's property exists, for example, under Hindu Civil Law a wife's property of jewels and valuables given to her by relatives are called Stridhanamu<sup>444</sup>.

<sup>440</sup> These examples were chosen in order to illustrate this point and to show an approach of the different communities to spouses' property relations.

<sup>441</sup> GOODY, J., *Production and Reproduction: A Comparative Study of the Domestic Domain*, Cambridge: Cambridge University Press, 1967, p. 6.

<sup>442</sup> A mahr is a mandatory payment, in the form of money or possessions paid by the groom, or by groom's father, to the bride at the time of marriage, that legally becomes her property.

<sup>443</sup> FAREEN, J., "Enforcing Mahr in the Canadian Courts", *International Journal of the Sociology of Law*, 2012 (3), 24.

<sup>444</sup> *Hindu Law*, vol. 1, 1830, cited by SACHDEVA, U., *Hindu Undivided Family: Law, Judiciary and Banks*, Delhi: UDH Publishers, 1987, p. 328.

## I. THE STATE ATTITUDE TO SPOUSES' PROPERTY RELATIONS REGULATION

### A. THE POSITION IN LITHUANIA WITH REGARD TO MARITAL PROPERTY RELATIONS

Under Lithuanian Civil Code Article 3.27 § 1 the spouses' obligation is to give material and moral support to each other, to partake in family affairs and to assist his/her spouse.

Under Civil Code there are two legal types of property regulations between spouses: they are legitimate and contractual. If a marriage property contract is not concluded then the legal property regulations are invoked for the spouses' property according to the common principle of Civil Code Article No. 3.81. Thus the main emphasis of the marriage contract is placed on the choice of the legal regulation for property. According to Lithuanian Civil Code Article No. 3.104 spouses can choose and change the marriage contract choosing one of three legal regulations:

- Property obtained before marriage and during the marriage is considered as each individual spouse's property;
- Property obtained before marriage existing as a spouse's personal property becomes joint co-property after the marriage registry;
- Property obtained after the marriage is considered as partial co-property.

A marriage contract is one way to regulate the spouses' property. It is a new act of Lithuanian Civil Law allows spouses to choose the legal treatment of their property since 2002. According to CC Article 3.101, a marriage contract is an agreement of two spouses to regulate their legal rights and duties during the course of their marriage, and also after divorce and while living in separation. It expresses a common will of both spouses, is voluntary and is grounded on the equality between husband and wife. However, an agreement can be concluded prior to marriage and after marriage, called a prenuptial agreement. According to Article 3.231 of the CC a prenuptial agreement can be concluded by an unmarried couple, and it is based on Articles 3.101-308 of the CC. The agreement deals with issues of property, emerging rights and duties between spouses. The parties of

an agreement can define the property obtained before marriage or during the marriage, after the divorce and while living in separation.

Married spouses in Republic of Lithuania can form their rights and duties associated with the management of their property, their mutual alimony payments. Meanwhile a matrimonial agreement doesn't regulate personal spouses' rights and duties. Thus a matrimonial agreement can appear as a non personal agreement, as only the property rights and duties of spouses' are regulated. However, an unambiguous conclusion cannot be made. Both personal and property relationships are matrimonial and are formed during the marriage process<sup>445</sup>.

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<sup>445</sup> Lithuanian Civil Code. Art. 3.28.

## B. THE RULES OF OTHER COUNTRIES WITH REGARD TO MARITAL PROPERTY RELATIONS

In any system of law it may be possible for spouses to regulate their rights and their property by agreement or settlement. The property rights of spouses depend on the matrimonial system<sup>446</sup> to which they are subject, which in turn depends on whether or not they have entered into a marriage contract and, if so, which type of contract.

In every European State<sup>447</sup>, private law as a whole is based on the principle of private autonomy, which gives the individual the possibility of shaping the legally binding private relationships. According to the principle of private autonomy and of freedom of contract, individuals are entitled to shape their private relationships according to their own will on their own responsibility<sup>448</sup>. For example, § 19 (1) of the Constitution of the Republic of Estonia stipulates that everyone has the right to free self-fulfillment, which, above all, includes the freedom to do something or not, as well as the freedom to enter into an autonomous private relationship or not<sup>449</sup>.

Accordingly, almost every European legal order also recognises the possibility for spouses to enter into a contract with each other in order to determine their proprietary rights and duties between themselves and how such property will serve as security for their creditors (common or personal). However, the boundaries of the freedom of contract are rather different, mostly subject to court review<sup>450</sup>.

The situation in *Poland* is similar to that in Lithuania, with property relations being regulated by law or by contract. The contract (*interczyza*) can be concluded before or after the marriage. The contract is concluded when spouses do not want to put their property under common law. The *interczyza* must be laid down in an act drawn up by a notary public otherwise it will be deemed invalid<sup>451</sup>.

<sup>446</sup> The main one being the Hague Convention of 12 April 1930.

<sup>447</sup> In order to disclose similarities, whichever the differences in field of marital property relations European Union countries were selected.

<sup>448</sup> ANTOKOLSKAIA, M., *Harmonisation of Family Law in Europe: A Historical Perspective: A Tale of Two Millennia*, Antwerp: Intersentia, 2006, p. 78.

<sup>449</sup> HALLIK, L., *Regulation of Proprietary Relations between Spouses in the New Family Law Act: Toward Better Regulation by Means of Private Autonomy?* Tartu: Juridica, 2010, p. 163.

<sup>450</sup> SCHWENZER, I., *Model Family Code. From a Global Perspective*, Antwerp: Intersentia 2006, pp. 82–83.

<sup>451</sup> *Marriage in Poland*, <http://www.wesele.pl.com//interczyza>, (last visited, Dec. 3, 2013).

*Hungarian Family Code*<sup>452</sup> laid the foundation for the system of separate property between spouses. Each spouse owns and controls his or her own property during the marriage and, on dissolution, each takes out what belongs to him or her. Separate property is property which belongs to one of the spouses and to each separately. In conformity with Article 28 of Family Code regarding separate individual property of spouses, the following matters are considered:

- Possessions before the marriage;
- Property presented to one of the spouses during the marriage;
- Property inherited by a spouse during the marriage;
- Individual possessions for personal use.

According to the Article 31 of *Hungarian Family Code* the spouses may voluntarily divide their property themselves. In this case, they would not go to court. A lawyer or notary must certify such a decision by the spouses. After dividing common property, it becomes separate property<sup>453</sup>.

Under civil law of the *Czech Republic*, joint co-property consists of:

- Property obtained by one or two of the spouses during the marriage except for the property inherited or gifted to one spouse;
- Property obligation of one or both of the spouses during the marriage except the property obligation belonging to one of the spouses<sup>454</sup>.

Under the 2003 *Croatian Family Law Act*, both the limited community of property and separate property are at the disposal of spouses. Community of property involves the property acquired by the spouses with respect to labour during the existence of their marital union<sup>455</sup> and of the income derived from that property<sup>456</sup>. There are two cumulative conditions for community of property under Croatian law: the property must have been *acquired by the labour* of both spouses, and it must have been acquired *during the marital union*. The labour of the spouses may be of any type: individual or joint, direct or indirect, as long as it creates a new value<sup>457</sup>. Thus, indirect contribution – labour that

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<sup>452</sup> The 1952 Family Code - still in force after a series of amendments.

<sup>453</sup> DÓCZI, *supra* note 431, p. 38.

<sup>454</sup> Czech Republic. Civil Code. As amended on 1 January, 2002. Art. 14.

<sup>455</sup> Under the Croatian law, a marital union includes an actual relationship and not the existing marital status.

<sup>456</sup> Material benefit gained with respect to copyrights and copyright-related rights and winning prizes are also included in matrimonial property (Arts. 252 and 254, 2003, Family Act).

<sup>457</sup> ŠARČEVIĆ, P., *Property Rights in the Family, Croatia*, in: *International Encyclopaedia of Laws, Family and Succession Law – Suppl*, The Hague: Kluwer Law International, 2005, p. 180.; KORAC, A., *Imovinski*



does not directly create a new value but enables the other spouse to increase the value of the property (e.g., taking care of the children, doing housework, providing moral support) – is considered to be a contribution to the community of property<sup>458</sup>. Legally, the spouses are co-owners of the community of property in equal parts, unless they have agreed otherwise<sup>459</sup>.

In the *Spanish* Código Civil Art. 1334 (old version) has been swept aside by the reform of family law; spouses can now conclude every kind of contract with each other<sup>460</sup>.

The *Dutch* legal matrimonial property regime, which recognises complete community of property, is unique in Europe<sup>461</sup>. That law does not contain a specific regime or set of rules governing in a systematic way spouses' property as I have defined matrimonial law. The principle of community of property is simple: both parties become owners of all assets gained before and during marriage<sup>462</sup>. Still, there are some exceptions, such as a property acquired pursuant to a hereditary succession, a testamentary disposition, the vesting of a beneficial interest subject to a testamentary obligation of a gift, and pension rights.

Under *English* law we can encounter a completely different approach to matrimonial property law. There, in the case of the dissolution of marriage, the court has in principle much more freedom to apportion matrimonial property according to its own perceptions. Also with regard to this legal system, one could pose the question whether an adaptation along the lines of European norms of party autonomy is not indicated<sup>463</sup>.

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*Odnosi Bračnih Drugova (Matrimonial Property)* in ALINČIĆ, M., HRABAR, D. and JAKOVAC-LOZIĆ, D., *Obiteljsko pravo (Family Law)*, Zagreb: Narodne novine, 2006, p. 495.

<sup>458</sup> ŠARČEVIĆ, *supra* note 460, p. 180; KORAC, A., *supra* note 460, p. 496. The recognition of indirect contribution in terms of the acquisition and division of matrimonial property has been present in Croatian legislation for over 60 years. The first evidence of the term can be found in the Yugoslav Marriage Basic Act of 1946. The legal theory sees it as “a support that spouses provide to each other regarding households, which is primarily related to housewives taking care of food, cleanliness, upbringing and child's care. Women's in-house labour enable men to make money working outside their place of living since it relieves them from taking care of their basic needs, satisfaction of which would be otherwise impossible without outsourcing. It is clear that the position of employed women also taking care of household is unique since they give double contribution to their families.” PROKOP, A., *Komentar Osnovnom Zakonu o Braku, (Comment to The Marriage Basic Act I)*, Zagreb: Školska knjiga, 1959, p. 36.

<sup>459</sup> Art. 149 2003 Family Act.

<sup>460</sup> CC Art. 1323, 1458 and 1541, new version.

<sup>461</sup> BOELE-WOELKI, K., BRAAT, B. and CURRY-SUMNER, I., *European Family Law in Action*, Antwerp-Oxford: Intersentia 2009; SUMNER, I. and WARENDORF, H., *Family Law Legislation of the Netherlands*, Antwerp-Oxford-New York: Intersentia, 2003, p. 60; VAN DER BURGH, G., *Overview of Matrimonial Developments in International Survey of Family Law*, Bristol: Jordan Publishing Limited, 2007, p. 209.

<sup>462</sup> SUMNER and WARENDORF, *supra* note 461, p. 328.

<sup>463</sup> DÓCZI, *supra* note 431, p. 78.

In *France*, community of property is addressed to both spouses jointly and is administered by both spouses in equal terms<sup>464</sup>. The particularity of the French system is compensatory transfers (*prestation compensatoire*), a combination of matrimonial property law and maintenance<sup>465</sup>. In most cases, the court can make compensatory orders at the time of termination of the marriage, which can be made over and above the distribution of community of property to compensate as far as possible any disparity in the standard of living of the spouses. The purpose of this order is to maintain the financially weaker party to the best standard possible in the circumstances. The law also authorizes the transfer of real estate owned by one spouse to the other as a valid form of compensatory allowance<sup>466</sup>.

The property rights of spouses in *Belgium* depends on the matrimonial system<sup>467</sup> to which they are subject, which in turn depends on whether or not they have entered into a marriage contract and, if so, which type of contract.

- The default legal system applies where there is no marriage contract. It enables the parties to retain individual ownership of assets owned before marriage and assets acquired by way of inheritance during marriage with all other assets acquired after marriage being shared equally or qualified as „common goods“.

- The system of common ownership. The parties can provide by contract that everything they own, whether acquired before or during marriage, is to be equally shared.

- The system of separation of goods. The parties can by contract agree not only to retain possession of their own pre-marriage assets but also their own income and saving during marriage<sup>468</sup>.

Under the *Italian* legal matrimonial system both spouses own property (immovable and movable) jointly during marriage, regardless of whether or not the property was purchased jointly or separately. Property belonging personally to a spouse (e.g., by gift or inheritance), or of a strictly personal use, or property used in a particular profession (such as a business established and managed by either spouse) are not included. Profits from property during marriage and income from the separate profession of each spouse are owned separately by each spouse during marriage, but on dissolution of the community, they become part of the community of property<sup>469</sup>. When the community of property comes to an end, each party

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<sup>464</sup> HAMILTON, *supra* note 358, p. 61.

<sup>465</sup> BOELE-WOELKI, *supra* note 461, p. 70.

<sup>466</sup> *Id.*, p. 275.

<sup>467</sup> 'Regime matrimonial'/'huwelijksvermogenstelsel'.

<sup>468</sup> HAMILTON, *supra* note 358, p. 6.

<sup>469</sup> *Id.*, p. 414.

becomes the owner of 50% of the family assets. Separate ownership of property can be proved “by any means”, otherwise property is presumed to be owned jointly<sup>470</sup>.

The *German* system of separation during marriage with equalization of accrued gains upon divorce, provides for the statutory regime called the community of gains. Upon the termination of the regime by divorce each spouse is under a duty to account for the increase of his or her property between the beginning and the end of the regime. The difference between the resulting amounts will be split, and the spouse whose increase was less than the other’s will have the right *in personam* to claim up to one half of the difference from the other<sup>471</sup>. The only possibility of departing from the rule is, if the claimant spouse culpably fails to promote the economic or other interests of the matrimonial venture during the marriage. Therefore, the claim must be defeated or curtailed on the grounds of gross inequity. Also, the judge may give weight to other facts, such as adultery or cruelty<sup>472</sup>.

In *Scandinavia*, spouses have separate property during marriage, but an equal division takes place upon divorce or in case of separation of the common goods when the marriage is dissolved by death of the spouse<sup>473</sup>.

Under *Austrian* law, if the marriage is terminated, the spouses are entitled to share each other’s wealth<sup>474</sup>. If spouses reach no agreement, the court has to decide over the division of their property according to the principle of equity. Assets are to be divided, taking into account the contributions of each spouse to the acquisition of the assets, children’s welfare and the debts connected to the expenses of conjugal life, including maintenance, housekeeping, the upbringing of children and assistance in general. The judge can order the transfer of property of movables and even of real estate, if an equitable partition cannot be achieved otherwise<sup>475</sup>. The general quota determined by the court is

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<sup>470</sup> HAMILTON, *supra* note 358, pp. 425-426.

<sup>471</sup> *Id.*, pp. 301-302; ZEKOLL, J. and REIMANN, M., *Introduction to German Law*, Netherlands: Kluwer Law International, 2005, pp. 256-258.

<sup>472</sup> SCHWEPPE, K., in: HAMILTON, *supra* note 358, pp. 302-309.

<sup>473</sup> SVEDRUP, T., *Maintenance as a Separate Issue – The Relationship Between Maintenance and Matrimonial Property*, in Boele-Woelki, K. (ed.) *Common Core and Better Law in European Family Law*, Antwerp/Oxford: Intersentia, 2005, pp. 122-127.

<sup>474</sup> VERSCHRAEGEN, B., *Family Law Reforms in Austria from 1992 to 1999, The International Survey of Family Law*, Bristol: Jordan Publishing Limited, 2001, pp. 40-42.

<sup>475</sup> RECHBERGER, W., *National Report Austria*, in: *Consortium Asser-UCL, Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law, European Commission*, [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/regimes/austria\\_report\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/austria_report_en.pdf) (2009), (last visited May 20, 2013); KRIEGLER, A., in HAMILTON, *supra* note 358, p. 24.

50:50. However, the quotas 1:2 or 1:3 are also possible, depending on the financial possibilities of the spouses or the triple burden thereof<sup>476</sup>.

When a marriage is dissolved under the Law of *Greece*, each spouse may make a claim for a distribution of profits and gains deriving from the property of the other spouse, to which he or she has contributed. On such occasions, every kind of assistance, direct or indirect, could be taken into account. Such assistance can include the performance of the household work, help given to the other's profession, the psychological support of the spouse, the creation of a pleasant family ambiance enabling the other spouse to be very efficient in his/her profession, providing ideas for the development of business activities, and the improvement of social relations which influence favourably the other spouse's profession<sup>477</sup>.

Thus, all types of family relationships arise from the specific juridical fact of marriage. A married couple gain new legal status as well as property- related and non-property- related rights. A marriage forms both personal rights and property- based relationships. Marriage forms a property- based relationships between the married couple, and between parents and children. Thus the relationship of a family is related through personal and non-property rights, involving the married couple as parents and their children; not as strangers. Property- based relationships arise from the personal relationship of a married couple according to family law. Moreover, property relations and personal relations are closely connected. Matrimonial agreements discuss particular property related rights which are acquired on the grounds of marriage. Property based relations discussed in the matrimonial agreement are grounded on mutual reliance, respect, loyalty and are not only based on property relations.

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<sup>476</sup> RECHBERGER, *supra* note, 475, p. 20.

<sup>477</sup> MOUSTRAIRA, E., *National report Greece*, in Consortium Asser-UCL, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, European Commission, [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/regimes/greece\\_report\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/greece_report_en.pdf) (2003), (last visited April 12, 2013), pp. 14-16.

## II. THE LITHUANIAN VIEW OF THE PROPERTY REGIME FOR INTERNATIONAL MARRIAGES

Each matrimonial property regime has its own aim and own purpose for covering the needs of a specific type of family and family life. No one legal matrimonial property regime is perfectly suited to all of the couples living under the same jurisdiction, because the factual relationship between the spouses and the needs of the spouses are not the same. This is especially true for international marriages – being mixed marriages or marriages of internationally-mobile couples. Therefore, it is useful for the spouses to have the possibility of shaping their proprietary relationship according to their needs and interests. They may determine their property regime and on the international level they may want to determine police national laws shall apply.

According to the conflicts provision in the Civil Code of Lithuania, the matrimonial property legal regime shall be governed by the law of the state of common domicile of the spouses. Where the spouses are domiciled in different states, the law of their common state of citizenship shall apply<sup>478</sup>. In those both cases spouses were domiciled in different countries: Lithuania and Russia and court applied the law of Lithuania as Lithuania was their common state.

Where the spouses have never had a common domicile and are citizens of different states, the law of the state where the marriage was solemnized shall apply. The example of this situation can be presented the decision of Lithuanian the Supreme Court in the civil case T. U. K. v. E. D., No. 3K-3-432/2010<sup>479</sup>. In this case the spouses have never had a common domicile and were citizens of different states. The Supreme Court of Lithuania applied the law of Lithuania as the marriage was solemnized in Lithuania. Those are the provisions of conflicts of law, governing spousal mutual property relations, i.e. legal status of property, obtained in marriage, mutual civil liability of spouses and the like, in cases when no marriage contract was executed. The law applicable to a contractual legal regime of matrimonial property shall be determined by the law of the state chosen by the spouses upon agreement<sup>480</sup>. In this event, the spouses may choose the law of the state in

<sup>478</sup> Lithuanian Case N. J. v Ž. J. 3K-3-255/2013; Lithuanian Case A. Musitova v I. Musitov No. 2-6947-658/2008.

<sup>479</sup> Lithuanian Civil Code, Art. 1.28. There is an exception regarding rights in immovable goods.

<sup>480</sup> Lithuanian the Supreme Court civil case. T. U. K. v. E. D., No. 3K-3-432/2010.

which they are both domiciled or will be domiciled in the future, or the law of the state in which the marriage was solemnized, or the law of the state a citizen of which is one of the spouses. They receive limited freedom of choice. The applicable law chosen by agreement of the spouses may be invoked against third persons only if they knew or should have known of that fact, i.e. if the third party knew or should have known the chosen law that governed the matrimonial property regime when the legal relationship commenced.

This article does not provide law, governing spousal maintenance. The law, governing these relations, is determined in accordance with the rules set in Art. 1.36 of the Civil Code.

The first paragraph Art. 1.28 of Lithuanian CC establishes the general rule of conflicts of law, namely that the matrimonial property legal regime shall be governed by the law of the country of domicile of the spouses. Thus citizenship of spouses has no influence on determination of governing law. The first paragraph also establishes two exceptions to this general rule. First of them provides that when the spouses have no common domicile but has a common citizenship, then the law of the country of common citizenship governs.

The second paragraph<sup>481</sup> provides that when the spouses have no common domicile and are citizens of different countries, the law of the country where the marriage was solemnized shall apply.

The agreement of the spouses about the applicable law shall be formally valid if it is in compliance with the formal requirements of the law of the chosen state or the law of the state in which the agreement is concluded<sup>482</sup>. Mutual property relations of spouses, who executed a marriage contract<sup>483</sup>, are governed by the law, determined in accordance with the rules set in the second paragraph of the CC Art. 1.28. Those provisions entitle spouses to select the law governing their marriage contract.

Legal status of a property under marriage agreement of spouses, who selected the applicable law at the time of the execution of their marriage contract, is governed by a law of the selected country. It is notable that this option is available for spouses only if a

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<sup>481</sup> Lithuanian Civil Code, Art. 1.28.

<sup>482</sup> The applicable law chosen by agreement of the spouses may be used in resolving a dispute related to real rights in immovable property only in the event that the requirements of public registration of this property deed and of the real rights therein, as determined by the law of the state where the property is located, were complied with.

<sup>483</sup> *Id.*

foreign (international) element is characteristic to their mutual property relations. For questions regarding a contractual agreement made at a later stage during the marriage – one must refer to section 5 of Art. 1.128 (see below).

We have indicated how this principle of freedom of choice of the parties is limited. The second paragraph of Article 1.28 of the Civil Code, states that spouses may upon execution of their marriage contract may select from three possible options: 1) the spouses may choose the law of the country in which they are both domiciled or will be domiciled in future; 2) the spouses may choose the law of the country in which the marriage was solemnized. In such case the legal status of a property under marriage contract is determined employing the principle *lex loci celebrationis*; 3) the spouses may choose the law of the country a citizen of which is one of the spouses.

The second paragraph of Article 1.28 of the Civil Code also establishes that the agreement of the spouses regarding the applicable law shall be valid if it is in compliance with the requirements of the law of the chosen country or the law of the country in which the agreement was concluded. This provision means that validity of such agreement is determined in accordance with the legal norms of the respective state, providing imperative requirements for contents as well as for the form of such agreement. For instance, what formal requirements should have been followed; like that of being in writing, required notarization and the like, shall be determined by the law of a country in which the agreement was concluded, or by the law of the country, chosen by the spouses (in order for the marriage contract to be held valid, the requirements of at least one of those countries should be met).

The fourth paragraph of Article 1.28 of the Civil Code discussed, is a special provision, regulating issues of selected applicable law in cases when the property in dispute is immovable property and when we consider real rights in that immovable property. In such cases an additional requirement is formulated in order for the selected applicable law to be applied, i.e. the applicable law chosen in the agreement of the spouses may be used only if the requirements of public registration of this property and of the real rights therein, in compliance with the law of the country where the property is located. The rule is formulated in a multilateral manner – so it would in principle apply independent of where the immovable is located (as *lex rei sitae*), but of course, it must primarily protect the third-party-interests in goods located within Lithuania.

The fifth paragraph of Article 1.28 of the Civil Code is a special provision, discussing issues of applicable law when spouses amend their marriage agreement in force, but when they fail to agree on the applicable law. For instance, the spouses had executed their marital agreement, establishing that their property is a common property, and later they amended the marriage contract and determine that property obtained from then on shall be personal property of each individual spouse, while the issue of applicable law remains undecided. In such a case the agreement and the question of its validity shall be governed by the law of the country of domicile of the spouses at the time of the change of property status. If the spouses are domiciled in different countries, the applicable law shall be the law of their last common domicile. If the spouses never had a common domicile, the governing the contract shall be the law governing matrimonial property relationships between the spouses<sup>484</sup>.

Most of Lithuanian bilateral agreements regarding legal aid provide that matrimonial property relations of spouses shall be governed by the law of the country, of which the spouses are citizens.

Any agreed change of the matrimonial property regime shall be governed by the law of the state of domicile of the spouses at the time of the change. If the spouses were domiciled in different states at the time of change of the matrimonial property law regime, the applicable law shall be the law of their last common domicile, or failing that, the law governing the matrimonial property relationships between the spouses.

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<sup>484</sup> Lithuanian Civil Code, Art. 1.28.



### III. THE POSITION OF CANON LAW WITH REGARD TO MARITAL PROPERTY

Under Canon law a family possesses some property<sup>485</sup>, moreover, family, as a constantly existing unit, needs continuous possessions<sup>486</sup>. The property of a family is common property. Thus, a single family member does not have the right of a particular property, or of separate property title<sup>487</sup>.

According to the church law both spouses have equal rights in their property. A new family is formed through marriage and is independent, compared to the families that it has come from. The relations to the families of spouses are based on blood; meanwhile a new family is based on moral love. Matrimonial agreements indicating the limitations of the property relations, legal protection and the like, can only be justified by anticipating the possible termination of a marriage after a spouse's death or divorce. Matrimonial agreements allow family members to protect their share and right<sup>488</sup>.

Property rights are certainly important, and could be the object of a lawsuit between the spouses; but they are not among the essential rights that c. 1095 refers to<sup>489</sup>. In our context, the essential rights and obligations must be those which so fundamentally touch the essence of marriage that, if the capacity of grasping them rationally or of assuming them is even minimally lacking, effective consent is impossible and marriage can absolutely not be constituted or brought into existence. Since these rights and obligations are those which are necessarily undertaken by whoever gives proper matrimonial consent, it should be possible to establish their nature from a consideration of the object of consent itself.

Marriage under Canon law cannot be terminated. Thus this question of the rights over matrimonial property in case of divorce is practically unstudied in the Canon code of church law. Basically there is one single canon, regulating marriage, and the rights and duties of engaged persons. Canon 1062 indicates property relations by looking at the engagement institution. Part 2 § of this canon states: if one of the spouses breaks the engagement promise there is no immediate action; however, damage compensation maybe

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<sup>485</sup> Under Canon 1056 the essential properties of marriage are unity and indissolubility.

<sup>486</sup> MEILIUS, *supra* note, 155, p. 24.

<sup>487</sup> VAIČEKONIS, *supra* note 210, p. 45.

<sup>488</sup> BRILIUS, *supra* note 216, p. 53.

<sup>489</sup> BEAL, *supra* note 144, p. 1395.

payable if required. The implication is if one of the litigants terminates his/her commitments without any reasons, he/she is obliged to pay the damage (for instance, the financial expenses of wedding preparation).

According to canon law “one must follow civil law as well as church law, if civil law does not oppose the divine law and if the law of canons does not indicate otherwise<sup>490</sup>. This shows the church draws the parallel with the property rules of the civil law.

#### IV. CONFLICTS IN MARITAL PROPERTY LAW ARISING IN THE CHURCH AND THE CIVIL LAWS

Although Civil Law has a smooth legal mechanism to regulate spouses’ property and the church law requires the spouses to follow provisions of relevant Civil laws, there are still some questions that arise and cause a degree of uncertainty. For example, Article 3.304 of the Civil Code of Lithuania provides that a church marriage and a marriage at a Civil Registry are valid, however, the law requires a clergyman of the Church to notify the Civil Registry and submit the marriage documents within ten days of the marriage agreement. If the notice is not given within ten days, the marriage is valid only after the registration at a Civil Registry and from that date. This implies that the spouses’ property regulating mechanism is not functioning before the marriage is certified at a Civil Registry. Thus, according to the law, if the church marriage is chosen, a marriage must be certified twice – before Church and before a Civil Registry. Moreover, a marriage not certified at a Civil Registry is invalidated and the property relationship of spouses cannot be determined in law nor litigated. For example, there will be problems of inheritance of property or regarding the spouses’ duties to support each other materially and emotionally. This signifies that the Church does not have the power neither to bring about nor to regulate spouses’ property relations; they are under the civil law after marriage registration<sup>491</sup>.

As a consequence, the couples, who do not notify the Civil Registry for moral reasons or because of their faith or for a lack of legal knowledge, will find themselves in an

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<sup>490</sup> CORIDEN, *supra* note 193, p. 22.

<sup>491</sup> BRILIUS, *supra* note 216, p. 51.

awkward situation, particularly after the death of one of the spouses. The spouse, who is still alive, cannot share in the common marital goods and furthermore does not by law receive an inheritance as spouse. This implies that the couples married only through the church, are still considered unmarried and placed under the law of unmarried couples. This situation can be considered a loophole in the family law and must in the opinion of this writer be amended. If the State validates a marriage registration by the church, consequently, the State should also validate the rights and duties, which arise as a result of the marriage. The above-mentioned Article implies that the Church is not interested in the spouses' property relations; therefore, the State should take the initiative and amend the rules in force because a church marriage does not organize spouses' property relations. Citizens face problems causing material and moral harm.

The legal problems of spouses' property regulation occur notably when a couple decides to divorce or live in a legal separation. As the Church does not approve of divorce and is not interested in the legal regulation of property relations, consequently, the State governs the termination of marriage and the winding down of property relations. If the marriage is concluded in a Civil Registry office or in both a Civil Registry and Church, the problems to govern spouses' property relations after the approval of separation or divorce are no other than which the civil law is made to answer. However, if the marriage is concluded only at the Church, problems and uncertainty are inevitable. In that case the problems are related to the legal regulations of family property, when spouses decide to divorce or live in separation<sup>492</sup>.

If the church marriage<sup>493</sup> has not been recorded at the Civil Registry Office within ten days and one of the parties dies, the surviving spouse loses the inheritance right of the deceased spouse's estate<sup>494</sup>. Below follows an example of the situation in the Court of Lithuania. In a Civil case a petitioner, J. K., applied to the Supreme Court for the right of succession<sup>495</sup>. The petitioner, J. K., indicated that she married J. O., in 1976. The marriage was formed through the Church by J. O.'s request. The marriage prospered until the death of J. O., in 1994. After the death of her husband J. K. was to inherit the property under J. O.'s last will. However, she did not receive her husband's property as a public

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<sup>492</sup> The Church also acknowledges the separation.

<sup>493</sup> Under the Constitution of Lithuania since 1992.

<sup>494</sup> Excluding the issues of the will.

<sup>495</sup> Supreme Court of the Lithuanian Republic, J. Kazanavičiūtė v. State, 3 K- 7 – 430, (S.C.C. 2001).

notary rejected their church marriage. The decision of the Supreme Court was not helpful. The Supreme Court decided that a right to succeed could have been restored if both of the parties were alive. As it has already been mentioned, church marriage was recognized after restoration of Lithuania's independence and after the announcement of the Constitution of Lithuania (Article 38) in 1992. Since the law was not operative at the time of this couple's marriage in 1976 and the marriage was not registered at the Civil Registry Office after 1992 when the new Constitution of Lithuania commenced, J. K. could not receive her husband's<sup>496</sup> property as a legatee.

If the marriage is formed, registered and recognized by the Republic of Lithuania it can be governed by the legal regulations regarding family relations. However, examples exist when church marriages are recognized by the State but only if it is beneficial to the State. To prove this statement, we provide below the example of Lithuanian court example case.

Petitioners, P. J. and L. K., appealed against the Tax Office at the Administrative Court of the Lithuanian Republic in 2001<sup>497</sup>.

The pensioners demanded to draw a pension and gain a tax concession. The widow and the widower engaged in marriage by the church and did not register their marriage at the Civil Registry Office. The court adjudicated that, the two spouses were a legal family, although they only married through the church. The marriage was declared valid by the court, although it was not registered at the Civil Registry office. Thus, the couple lost their tax benefits and rights of widows/widowers pensions.

A religious marriage is concluded in accordance with the procedures established by internal law (canons) of the respective religion. This is the same in all Roman Catholic countries but the attitude towards church law varies. In the course of time, more countries are legalizing property relation agreements of the persons entering into marriage or already married, because the number of individuals, who are able to solve their problems and discuss some issues by themselves, avoiding the legal procedure, is increasing. Although every country has different requirements for making such agreements, as to their content and form, still some similarities can exist. Spouses have the freedom to make an agreement on the legal regulation of family property rights and duties. However, in every country this

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<sup>496</sup> The husband by the Church.

<sup>497</sup> Administrative Court of the Lithuanian Republic, P. Jonaitis & L. Kazokaitienė v The Taxman, 2A – 5 – 456 (A.C. 2001).

freedom is limited because family relationships should be based on the equality of spouses and on the priority of protecting and safeguarding the rights and interests of children involved.

To sum up, family property relations are regulated by the State, while the Church assigns its churchgoers to obey the Civil law. The legal problems can occur if the church marriage is not recorded to the Civil Registry Office within ten days after marriage. It is unfair with respect to spouses; if the marriage is only recorded at the Church due to some unforeseen reasons<sup>498</sup> or if the marriage is not registered because of unexpected death of one of the spouses. In this case the spouse who is still alive cannot receive an inheritance and he/she cannot take over the property and enjoy personal rights of the deceased spouse. When the Civil Code was debated, an issue of vagueness of this norm was raised. According to the CC, Article 304, part 1, the conclusion of a marriage procedure established by the Church (confessions) must be recorded at the Civil Registry Office by a clergyman delegated by the Church. So, a married couple can not be fully aware unless the duty, to register has been completed properly. It would seem then, on the merits of this finding that Christian marriage is not fully respected<sup>499</sup>. Consequently, it is not clear who is responsible and what procedures regulate the matter if the duty is not completed<sup>500</sup>. Thus, the State should solve the problems with marriage registration; if a church marriage license is valid, the marriage registration period should be reconsidered and an appropriate mechanism of the marriage registration should be created to warrant equality of spouses married by the church or by a Registrar. The problems associated with the legal regulation of family property relations also occur when a couple decides to divorce or live in separation. As the State governs the validity and termination of a marriage and property, it has created a legal mechanism to govern family relations; while the Church does not approve of divorce and is not interested in the legal regulation of property relations.

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<sup>498</sup> Sometimes (*ex gravi et urgenti*), the marriage by Church cannot be registered or it can be kept close, according to canon 1130-1130: the formation of the marriage is notified in the special Registry and the notice is kept in the confidential Curia Archive.

<sup>499</sup> See the discussion in this thesis in part IV, chapter 1, section II.

<sup>500</sup> MEILIUS, K., *supra* note 217, p. 28.

## V. MATRIMONIAL PROPERTY RELATIONS OF SPOUSES IN COMPARATIVE CONFLICTS OF LAWS

The adoption of a European instrument relating to matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan<sup>501</sup>. The programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council and the Commission at the end of 2000, provided for the development of an instrument on jurisdiction and the recognition and enforcement of decisions as regards matrimonial property regimes and property consequences of the separation of unmarried couples. The Hague programme, which was adopted by the European Council on 4 and 5 November 2004 and established the implementation of the mutual recognition programme as a first priority, and the Council and Commission Action Plan implementing it called<sup>502</sup> on the Commission to submit a Green Paper on “the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition”<sup>503</sup>.

A particular consequence of the increased mobility of persons within a European area without internal frontiers is a significant increase in all forms of unions between nationals of different Member States or the presence of such couples in a Member State of which they do not have the nationality, often accompanied by the acquisition of property located on the territory of several Union countries. The preliminary study commissioned by the Commission in 2002<sup>504</sup> revealed that more than 5 million foreign EU nationals lived in another Member State of the Union, while there were around 14 million non-EU foreign residents in the Union in 2000. This study estimates that almost 2.5 million items of real property were owned by spouses and located in Member States different from that of their

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<sup>501</sup> *Vienna Action Plan*, [http://europa.eu/legislation\\_summaries/other/l33080\\_en.htm](http://europa.eu/legislation_summaries/other/l33080_en.htm), (last visited April 12, 2013).

<sup>502</sup> Hague Programme, “Strengthening freedom, security and justice in the European Union”, included in the conclusions of the Presidency of the European Council of 4 November 2004. [http://europa.eu/legislation\\_summaries/human\\_rights/fundamental\\_rights\\_within\\_european\\_union/l16002\\_en.htm](http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm), (last visited April 12, 2013).

<sup>503</sup> Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (OJ C 198, 18.8. 2005, p. 1).

<sup>504</sup> Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States, 30 April 2003, ASSER-UCL Consortium commissioned by the Commission, pp. 206 et seq., at [http://europa.eu.int/comm/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm), (last visited April 12, 2013).

residence. The Commission impact study<sup>505</sup> relating to its proposal for a Regulation on applicable law and jurisdiction in divorce matters shows that there are approximately 170.000 international divorces in the Union each year<sup>506</sup>.

On 16 March 2011 the Commission presented the proposals for two regulations on property rights of “international” married couples and registered partnerships:

1. Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 of 16 March 2011;
2. Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 of 16 March 2011.

A study carried out by the consortium ASSER-UCL in 2003<sup>507</sup> showed the large number of transnational couples within the Union and the practical and legal difficulties such couples face, both in the daily management of their property and in its division if the couple separate or if one of the two dies. These difficulties often arise from the great disparities between the applicable rules of substantive law and private international law governing the property effects of marriage<sup>508</sup>.

The purpose of this Regulation is to establish a clear legal framework in the European Union for determining jurisdiction and the law applicable to matrimonial property regimes and facilitating the movement of decisions and instruments among the Member States.

The legal basis for this Regulation is Article 81(3) of the Treaty on the Functioning of the European Union, which confers on the Council the power to adopt measures concerning family law having cross-border implications after consulting the

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<sup>505</sup> This impact study was published at the same time as the Commission adopted this proposal.

<sup>506</sup> Commission of the European Communities Brussels, 17.07.2006 com. (2006) 400 final Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (presented by the commission) (sec. (2006) 952).

<sup>507</sup> ASSR- UCL Consortium, Study in comparative law on the rules governing conflicts of jurisdiction and laws on matrimonial property regimes and the implementation for property issues of the separation of unmarried couples in the Member States. [http://europa.eu.int/comm/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm), (last visited November 22, 2013).

<sup>508</sup> BUONO, G., *Commission's Proposals on Matrimonial Property Regimes and Property Consequences of Registered Partnerships*, March 24, 2011, <http://conflictoflaws.net/2011/commissions-proposals-on-matrimonial-property-regimes-and-property-consequences-of-registered-partnerships/>, (last visited 2013, November 22).

European Parliament. The second subparagraph of Art. 81(3), however, provides a “passerelle-clause”, under which “the Council, on a Regulation from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure”. The third subparagraph of the provision grants to national Parliaments of the Member States a veto power, to be exercised within six months of the notification of the Commission’s Regulation to enact the “passerelle”<sup>509</sup>.

A matrimonial property regime derives from the existence of a family relationship between the individuals involved. Matrimonial property regimes are so closely linked with marriage that, even though they concern property relationships between spouses and between spouses and third parties, they must be considered part of family law. They exist where a marriage exists and disappear when the marriage is dissolved (following the death of one of the spouses, or a divorce or legal separation)<sup>510</sup>.

The aim of the Regulation is to establish a comprehensive set of rules of international private law applicable to matrimonial property regimes. It therefore touches on matters of legal jurisdiction, applicable law and the recognition and enforcement of decisions in matrimonial property cases. The rules proposed are concerned only with cross-border cases.

The subject of matrimonial property regimes is generally seen as including both the property consequences of the dissolution of marriage and those arising during its lifetime. While the couple are still living together, debts incurred as a result of the common or individual acts of the spouses have to be attributed to their common or individual property, in order to divide the burden both as between them and in relation to third parties.

Most of the Member States allow the spouses to choose the law applicable to the matrimonial property regime. If one envisages allowing such a choice in a future instrument, a limited number of connecting factors should obviously be provided for, in particular those involving an actual link with the spouses (e.g. the law of the state of the habitual residence or nationality of one or both spouses). The question whether the choice

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<sup>509</sup> Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. European Commission, Brussels, 16.3.2011. 2011/0059 (CNS); <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF> (last visited 2013, November 22).

<sup>510</sup> Actual cases are reported by SONNENBERGER, F., *Der Erbfall X. – Französisches Ehegüter- und Erbrecht vor dem deutschen, Festschrift Geimer*, Berlin/München: Carl Heymanns Verlag KG, 2002, pp. 1241-1267.



of applicable law should be subject to formalities and, if so, what formalities will also have to be considered?

There is also the question whether or not this agreement between spouses should be subject to a limitation in time, being applicable only in the event of the couple separating or while the parties are still living together? In that case, care must be taken not to undermine third parties' rights.

Problems in matrimonial property regulation arise, however, in cases where the property regime is dissolved by the death of one spouse through the lack of coordination between international matrimonial law and succession law. For example, the application of German conflict of law rules in a given case may be very complicated<sup>511</sup>. A proper conflicts rule should take account of the various models of property distribution between spouses in different countries. There were more foreign women who marry a German than the other way round<sup>512</sup>. The goal is that the widow or widower does not obtain less than what they would obtain if only one legal system were applicable. German PIL tries to resolve the possible incompatibility between statutes through the mechanism of adaptation (*Angeleichung* or *Anpassung*), which however entails legal insecurity and possible unjust results<sup>513</sup>.

When a conflict of law system has different rules on succession and matrimonial property it may happen that different laws apply at the same time. This may result in allowing the widow or widower to obtain either more or less than would be available under each of the two national systems concerned. This means that the widow or widower can be economically advantaged if both statutes namely the national law governing matrimonial property and the national law governing succession, grant him or her succession rights. On the contrary, she or he will be unfairly neglected when each applied legal system (both the matrimonial property and the succession) provides that the widow or widower has no share the division of community goods nor in succession rights. An additional difficulty, is, that some legal systems, like the French law on private international law adopt the principle of the succession only in relation to the succession statute and not to the matrimonial property

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<sup>511</sup> SONNENBERGER, F., *Die question anglaise als Problem deutsch-französischer Nachlassspaltung*, IPRax, Berlin/München: Carl Heymanns Verlag KG, 2002, pp. 169-186.

<sup>512</sup> In 2001: Foreign men 39 234, foreign women 45 750 (out of 418 550 of those marrying their respective sex groups), Statistisches Bundesamt. Stuttgart: Statistisches Jahrbuch, 2002, p. 69.

<sup>513</sup> VÖLKL, M., E., *Kommentar zu Art. 25 EGBGB in Deutsche Gesellschaft für Erbrechtskunde*, Köln/Berlin/München: Carl Heymanns Verlag, 2003, p. 1477.

regime.

In Spanish Private International Law there are different conflict of laws rules on succession and the matrimonial property regime. It should also be recalled that Spanish private law is not unified throughout the autonomous regions; and that we therefore have many conflict situations in cases for inter-regional marriages, even where there is no international element. Article 9.8 of the Spanish Civil Code applies to both international and internal situations of conflict-of-laws. The final sentence of the conflict of laws rule contained in Article 9.8 CC<sup>514</sup> covers succession. It seeks however to avoid the problem of reconciling the law applicable to matrimonial property and the law applicable to the succession rights of the surviving spouse.

Article 9.8 CC provides that the succession claim of the surviving spouse is governed by the law applicable to the effects of the marriage under Article 9.2 CC, unless there has been a will, but not including the legally reserved succesorial portions of the descendants. Contractual or testate succession will not be governed by this referral to the statute of matrimonial property under Article 9.8, but rather by the testator's national law or the disponent's national law at the moment of the grant<sup>515</sup>.

The conflict of laws system in England differs from continental legal systems with respect to sources, and also regarding the fact that, when an English judge decides he has international jurisdiction, he will often apply domestic law. In the field of the effects of marriage on property, rights obtained by the husband or the wife dealing with movable property are determined by the law of the matrimonial domicile, providing is no specific contract or settlement<sup>516</sup>. It is not clear if this rule also applies to immovables, because,

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<sup>514</sup> Article 9.8 Spanish Civil Code determines: Succession by reason of death will be governed by the national law of the deceased at the moment of his death, whatever the nature of the property and whichever country it is in. However, dispositions in the will and successory agreements which are in accordance with the national law of the testator or of the disponent at the moment of their being executed will conserve their validity, although another law may govern the succession, and any legally reserved portions will be in accordance with the latter. The rights that by law are attributed to the surviving spouse will be governed by the same law that regulates the effects of the marriage, save in respect of the legally reserved portions of the descendants.

<sup>515</sup> TORNE, M., *The Dissolution of the Matrimonial Property Regime and the Succession Rights of the Surviving Spouse*, New York: Cornell Law School, 2007, p. 4.

<sup>516</sup> USA case. In *Re Marriage of Banks* 42 Cal. App. 3d 631. Civ. No. 34453. Court of Appeals of California, First Appellate District, Division Four. October 24, 1974. In this case English law was held to be a proper law in *Duke of Marlborough v. Attorney-General*. It was held that the proper law was English law and that estate duty was payable. It was held that the settlement was valid because English elements in gave reason for not applying the law of the matrimonial domicile.

although some decisions of the House of Lords adopt a unitary view both to movables and immovables, other decisions consider that the latter depend on the *lex situs*<sup>517</sup>.

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<sup>517</sup> DICEY, A., MORRIS, J. and COLLINS, L., *The Conflict of Laws*, London: Sweet & Maxwell, 2006, p. 1299.

## **PART IV**

### **VALIDITY AND RECOGNITION OF A FOREIGN MARRIAGE AND ITS DISSOLUTION**

## ***Chapter 1***

### ***Marriage validity and recognition***

#### **I. VALIDITY OF FOREIGN MARRIAGES AND THE PROCEDURE OF CONCLUSION OF FOREIGN MARRIAGES AND THEIR CONSEQUENCES**

##### **A. INTERNATIONAL MARRIAGE RECOGNITION RULES**

In recent decades, adults in many countries have become increasingly able and willing to travel abroad in pursuit of work, study and foreign holidays. One consequence of this has been a growth in the number of men and women from one of this country who take foreign spouses abroad. In time, many of these married couples decide to settle in this country. In so doing, they commonly raise questions about immigration rights for the foreign spouses concerned<sup>518</sup>. Similar questions also arise where, for example, neither party is a European domiciliary but one of the parties to a foreign marriage has been offered employment in Europe. Given the current climate in which immigration has become a highly politicized issue, the validity of such foreign marriages has correspondingly grown in significance, for it is frequently the validity of an overseas marriage that determines the immigration rights of a foreign spouse<sup>519</sup>.

In deciding whether a foreign marriage should be recognized as valid according to the rules of private international law of a country, the courts must consider a range of legal, cultural, moral, religious and social values that are held in high esteem both by the country in which recognition is sought and the country in which the marriage was

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<sup>518</sup> Law Com No 42 *Family law: Report on Polygamous Marriage* (London: HMSO, 1996) paras. 23-24, shows that between 1985 and 1995, some 175, 630 persons were permitted to settle in this country having migrated from India, Iran, Iraq and Saudi Arabia. Naturally, many of these people were Muslims for whom polygamous marriage would be acceptable, and perhaps even desirable.

<sup>519</sup> See, eg, *R v. Secretary of State for the Home Dept, ex p Ullah* [2003] EWCA Civ 1366 and *R (K) v. London Borough of Lambeth* [2003] 2 FLR 1217. The significance of immigration following a foreign marriage was expressly recognised at the Hague Conference on Private International Law. Yet the Convention that followed- the Hague Convention on Celebration and Recognition of the Validity of Marriages 1978 - was thought unacceptable by the United Kingdom, and ratification was withheld.

celebrated<sup>520</sup>.

Most countries distinguish between marriage formalities and marriage essentials<sup>521</sup> for purposes of marriage recognition. The predominant recognition rule regarding marriage formalities if it was concluded abroad is to simply apply the law of the place where the marriage was celebrated<sup>522</sup>. “There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage”<sup>523</sup>. Exceptions to this *lex loci celebrationis* rule regarding marriage formalities include consular marriages and marriages by members of the military serving abroad in some circumstances.

Regarding marriage essentials there are two dominant choice-of-law systems widely used for international marriage recognition. One is the rule checking the compatibility with the personal law<sup>524</sup>. The other is again to apply the rule of *lex loci celebrationis*<sup>525</sup> and then to check in case of recognition whether the parties abided by the substantial requirements of the foreign local law.

The personal law system includes two different rules for determining personal law: *lex patriae*<sup>526</sup> and *lex domicilii*<sup>527</sup>. *Lex patriae*, which applies the law of the nationality of each individual in the couple, is the traditional choice of law rule for marriage recognition in most of Continental Europe, as well as in most of Arab world countries with western legal systems. The other personal law regime looks to the law of the domicile (*lex domicilii*). This is the choice of law rule for marriage recognition in the United Kingdom, many commonwealth countries, Nordic countries and some Latin American countries. When the marriage involved parties of different nationalities or domiciles, the courts traditionally gave preference to the husband’s personal law, based on the notion that the husband is the head of the family. Today, it is likely that the law of both parties might be consulted or if one of the parties is a resident of the forum state, forum law would be given

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<sup>520</sup> MURPHY, J., *International Dimensions in Family Law*, Manchester: Manchester University Press, 2005, p. 33.

<sup>521</sup> Often called capacity in choice of law literature.

<sup>522</sup> Under Art. 3 of 1978 Hague Convention on Celebration and Recognition of the Validity of Marriage: *The formal requirements for marriages shall be governed by the law of the State of celebration.*

<sup>523</sup> NORTH, P. and FAWCETT, J., *Private International Law*, London: Butterworths, 1987, p. 558.

<sup>524</sup> The law that defines the personal status of the parties.

<sup>525</sup> The law of the place of celebration.

<sup>526</sup> The law of one’s nationality.

<sup>527</sup> The law of one’s domicile.

priority. *Favor validitatis*<sup>528</sup> may also influence the choice of law when the parties are from different jurisdictions<sup>529</sup>. Thus, when other factors are balanced, the benefit of the doubt usually falls to upholding the validity of the marriage. Even when the other factors are not in equipoise, courts<sup>530</sup> tend to start with the presumption that the marriage should be upheld as valid unless the law or public policy compel the invalidation of the marriage<sup>531</sup>.

The other major system for deciding marriage validity with reference to essentials is the *lex loci celebrationis* rule. States that follow that regime apply the law of the place of celebration to essentials as well as to formalities in determining marriage validity. Countries that follow *lex loci celebrationis* today include the United States of America, several Latin American countries, and Scandinavian countries *inter se*. In those states, marriage that is valid under the law of the place of celebration is generally valid in the forum or the country addressed for recognition also.

Evasive marriages can be a significant problem in *lex loci celebrationis* states, because the restrictive policies of the state with greatest interest in regulating marriage (usually the state of domicile or nationality) may be evaded by the simple expedient of crossing a border to celebrate the marriage, and then returning to the restrictive state to live. Thus countries that follow a *lex loci celebrationis* approach generally also assert their right to refuse to apply the law of the place of celebration to evasive marriages of their own citizens. The *lex loci celebrationis* rule (like the personal law rule) is subject to the ordre public exception in choice of law.

## B. RECOGNITION TREATIES AND INTERNATIONAL AGREEMENTS

There have been numerous bilateral treaties, conventions, and regional agreements addressing various aspects of international marriage recognition. Several multilateral documents and agreements dealing with marriage recognition or regulation purport to be world-wide in scope. For example, the Universal Declaration of Human

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<sup>528</sup> An underlying policy value that can be seen in many marriage recognition cases is the premise or presumption *favor validitatis* that, is the law favors marriage validity.

<sup>529</sup> WARDLE, L., *International Marriage Recognition: A World Dilemma, in Families across Frontiers*, The Hague: Martinus Nijhoff publishers, 1996, pp. 77-85.

<sup>530</sup> USA case : Reid v Reid [1911] 72 Misc. 214, 129 N.Y.; English case : Wolfenden v. Wolfenden [1946] P 61; German case: Savenis v Savenis [1950] SASR 309; German case : Kuklycz v. Kuklycz [1972] VR 50.

<sup>531</sup> WARDLE, L. and NOLAN, L., *Fundamental Principles of Family Law*, Praeger: David Orgon Coolidge eds., 2002, p. 213.

Rights declares that all “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry...” The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>532</sup> provides that “no marriage shall be legally entered into without the full and free consent of both parties,” but it strives to eliminate child marriages. The International Convention on the Elimination of All Forms of Racial Discrimination, promulgated by the United Nations in 1966<sup>533</sup> requires signers to guarantee all persons, regardless of race, colour, national origin, and ethnicity “the right to marriage and choice of spouse”. The 1966 International Covenant on Civil and Political Rights<sup>534</sup> establishes the right to marry and the prohibition of discrimination set out in the Universal Declaration.

Several notable multilateral conventions provide regional marriage recognition rules, such as the 1889 and 1940 Montevideo Treaties on International Civil law, which are very influential in Latin America, which reportedly adopt the general principle of *lex loci celebrationis* to determine marriage validity. The 1928 Code of Private International Law (Bustamante Code), approved by at least fifteen Latin American nations, provides that all substantive marriage issues are governed by the personal law of the parties, and each State is free to determinate whether domicile or nationality (or other criteria) provides the connecting factor useful for the personal law. The American Convention on human Rights appears to reinforce the choice of law generally prevailing in Latin America, that the law of the place of celebration governs all questions concerning marriage celebration and validity.

The 1964 Paris Convention to Facilitate the Celebration of Marriages Abroad<sup>535</sup>, authorizes the state of celebration to grant a dispensation from marriage impediments

<sup>532</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962. Entry into force: 9 December 1964, in accordance with article 6 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx>, (last visited May, 15, 2013).

<sup>533</sup> International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, (last visited May, 28, 2013).

<sup>534</sup> International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, (last visited July, 26, 2013).

<sup>535</sup> Convention to Facilitate the Celebration of Marriages Abroad Signed at Paris on 10 September, 1964, <http://ciec1.org/Conventions/Conv07Angl.pdf>, (last visited May, 15, 2013).



based on the personal law of a habitual resident of the state of celebration. The 1967 Luxembourg (C.I.E.C.) Convention on the Recognition of Decisions Concerning Marital Relations<sup>536</sup>, provides that when a divorce or annulment has been recognized in a contracting state, it may not refuse to allow a party to remarry on the ground that some other state<sup>537</sup> would not recognize the divorce or annulment<sup>538</sup>. The 1976 Hague Convention on Celebration and Recognition of the Validity of Marriages provides, generally, a *lex loci celebrationis* rule for both the formal requirements as well as the substantive validity of the marriage.

Mostly the treaties that relate to this issue are the consular treaties. First of all we have the multilateral convention of Vienna on consular representation of 1962 (Lithuania is a party of this convention since 15 of January, 1992), then subsequently the bilateral consular conventions.

Lithuania is not party to 1968 Council of Europe Convention for the Abolition of Legalization of Documents Executed by Diplomatic Agents or Consular officers nor to the 1987 Brussels Convention abolishing the Legalization of Documents in the Member States of the European Communities. Lithuania has entered into agreements abolishing the requirement of legalization with several states in- and outside the European Union<sup>539</sup>.

Issuance of birth certificates, marriage certificates, civil partnership certificates, certificates proving or annulling/terminating a marriage/civil partnership and other documents proving family or other durable relationship falls within the scope of the competence of the Ministry of Justice of Lithuania. The Ministry of Justice has delegated administrative powers, in particular, issuance of certain certificates to the Civil Registry Offices and they exercise this power. The rules governing the procedure of issuance of these documents are laid down in Minister of Justice Order No. 1R-160 (19th March 2006).

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<sup>536</sup> Convention on the Recognition of Decisions Relating to the Matrimonial Bond Signed at Luxembourg on 8 September 1967, <http://ciec1.org/Conventions/Conv11Angl.pdf>, (last visited May, 28, 2013).

<sup>537</sup> Presumably the state of nationality or domicile of the applicant.

<sup>538</sup> WARDLE, L., *International Marriage and Divorce Regulation and Recognition*, Leiden-Boston: Martinus Nijhoff Publishers, 1995, p. 85.

<sup>539</sup> In appendix No. 4 Lithuanian agreements and conventions on legal assistance and legal relations in civil, family and/or criminal cases.

## C. ISSUES OF RECOGNITION OF A FOREIGN MARRIAGE IN LITHUANIA

Private international law operates in three closely interrelated areas of jurisdiction, applicable law and recognition and enforcement of decisions. It relates to contractual, non-contractual, and family law relations that contain an international (foreign) element.

In the field of family law with cross-border implications, the legal regulation of private international law is often clearly interrelated with the approaches adopted at the level of the substantive law<sup>540</sup>.

Issues of recognition in Lithuania of a foreign marriage are of fundamental importance for the status of the parties and any children, as well as for other aspects of personal and community life. It is often a preliminary question in family law, to decide on other courses of action or to the way administrative authorities regard a relationship. By the data of Lithuanian civil registration bodies, in 2012, there were recorded 2599 marriages that took place abroad, which made by 5 percent more than marriages in 2011, when the number was 2469.

Before analysing these issues, however we must clarify the meaning of the term “foreign marriage” as it is used in this chapter. It is important to do this because the phrase could in fact be used to describe three types of marriage. First, it could be used to describe marriages celebrated according to some kind of foreign rites or customs. The second way in which the term foreign marriage can be used relates to marriages that are foreign in the sense that they were actually celebrated on foreign soil<sup>541</sup>. It is marriages of this kind which we are principally concerned here. But we must also consider a third type of ‘foreign’ marriage. This last category comprises those marriages that take place in this country where at least one of the spouses is a foreign domiciliary<sup>542</sup>.

Whether the Lithuanian courts consider the recognition of a marriage which has taken place in a foreign jurisdiction, recognition depends on two independent factors being

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<sup>540</sup> NEKROŠIUS, V., *Europos Sąjungos Civilinio Proceso Teisė*. [European Union civil procedure law], Vilnius: Justitia, 2009, p. 80.

<sup>541</sup> There are two types of marriage to which this categorisation may only contentiously be applied: proxy marriages (where one party maybe domiciled and resident in country X, but married by proxy in country Y), and marriages take place in foreign consulates and embassies (where it may be argued that the extra-territoriality principle should apply).

<sup>542</sup> See, eg., *Simonin v. Mallac* (1860) 2 Sw & Tr 67 (marriage in England between a French man and French woman); *Ogden v. Ogden* (1908) P 46 (marriage in England between a French man and an English woman).

separately satisfied. First, the marriage must be “*formally*” valid and secondly each of the parties to the marriage must have “*capacity*” to marry. “*Form*” relates to the manner in which the marriage is established and is governed by the law of the country in which the marriage takes place, the “*lex loci celebrationis*”, with certain exceptions. By way of example, if the local law of the country where the marriage is contracted requires a particular type of ceremony which would not be required in Lithuania, then unless that ceremony has been performed in accordance with the local law, the marriage will not be recognised here, even if it was perfectly correct under the formalities of Lithuanian law.

“*Capacity*”<sup>543</sup> relates to the legal ability of one person to marry another<sup>544</sup>.

Lithuanian case law when dealing with issues on foreign marriage recognition is not numerous and available information is far from complete. The main problems for the recognition of a marriage concluded abroad often arise from writing the names of the spouses, other ‘problematic’ issues which I am going to discuss in this chapter is change of sex of one of the spouses, same sex marriage and polygamy.

Such problem related with writing the names of the spouses, was raised in the Civil Case No. 3K-7-20/2006 of the Lithuanian Supreme Court. The claimant M. C. in that particular case requested that the Civil Registry Office at the Law Department of the Vilnius City Municipality would enter into records the marriage concluded in the Carson City, the State of Nevada in the United States on October 6, 2003, between M. C. and G. P., by enrolling the name of the claimant (the name of the spouse with the masculine ending of the name). The claimant stated that the Civil Registry Office refused to enter into records the marriage between her and the person G. P. concerned, concluded in the State of Nevada, the USA, on the grounds that the applicant's choice of the spouse's name form does not meet the rules of the state Lithuanian language. As it was not established, that M. C. and G. P. concluded the marriage in the United States with the aim of avoiding marriage annulment (marriage of nullity not identified as referred to in Article 3:37 of the Civil Code), the jury of the Civil Division at Vilnius District Court justly imposed upon the Civil Registry Office at the Law Department of the Vilnius City Municipality the obligation to enter the marriage between M. C. and G. P., concluded in Carson City, the State of Nevada in the United States on October 6, 2003, into its records, but unjustly ordered the recording

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<sup>543</sup> Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage. Dublin: Law Reform Commission, 1987, p. 35.

<sup>544</sup> For example, a brother does not have the capacity to marry his sister under the law.

of civil status' records and erroneously issued a marriage certificate where the name of the claimant was not M.C. but M. (paragraph 57 of the Civil Registry rules).

Another possible problem in the recognition of a foreign marriage is the change of one or both spouses' sex before or after completion of the marriage. The most prominent example in this regard is the case of *L. v. Lithuania* heard by the European Court of Human Rights (ECtHR)<sup>545</sup>, in which a violation of Article 8 of the Convention due to an existing legal gap in Lithuanian legislation as regards the right to gender reassignment has been found<sup>546</sup>. The Court found that the circumstances of the case revealed "a limited legislative gap in gender-reassignment surgery," which left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. The Court also stated: "Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, over four years have elapsed since the relevant provisions came into force and the necessary legislation, although drafted, has yet to be adopted" Despite the fact that legal gap is still pending, the Lithuanian courts, prompted thereto by the ECHR, had formed a case law<sup>547</sup> considering legislative omission described above as a sufficient ground for a civil liability of the State filling a legal gap ad hoc (by deciding concrete cases). This has two consequences: 1) that of compensating the inactivity of national parliament delaying to execute the judgment of the ECtHR and 2) that of safeguarding the implementation of the rights of the transsexuals.

With a view to the recognition of a foreign marriage in Lithuania, one more problematic issue arises – it is the recognition problem of marriages between individuals of the same sex and polygamous marriages. The issue of same-sex marriage recognition has not been analyzed under the Lithuanian legal doctrine, although some relevant comments had been made by professor Vytautas Mizaras<sup>548</sup>. Some debates took place in the popular

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<sup>545</sup> The Judgment of the ECtHR of 11 September 2007 in the case of *L. v. Lithuania*, Application no. 27527/03.

<sup>546</sup> The first paragraph of Article 2.27 of the Civil Code (which only came into force on 1 July 2003) provides an unmarried adult has the right to gender reassignment surgery, if this is medically possible. A request by the person concerned must be made in writing. The second paragraph of this provision states that the conditions and procedure for gender reassignment surgery are established by law. The ECtHR has stated that non-adoption of a special law leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. Until now such a law is not enacted.

<sup>547</sup> The Judgment of the Lithuanian Supreme Administrative Court of 29 November 2010 in administrative case No. A 858-1452/2010.

<sup>548</sup> MIZARAS, V., *Tarptautinės privatinės teisės vienodinimo Europos Sąjungoje rezultatai: Reglamentai Roma I ir Roma II* [The results of private international law in the EU: Regulations Rome I and Rome II],

media<sup>549</sup>, but they did not analyze the issues thoroughly and focused more generally on the discussions of same-sex couples' rights in Lithuania.

In 2000, the Lithuanian Supreme Court argued that Lithuania would recognize polygamous marriages as well<sup>550</sup>, however, up to now, neither case law nor scientific debate on this matter has been carried out.

Under Article 1.25, chapter 4 of Lithuanian CC a marriage validly performed abroad shall be recognized in the Republic of Lithuania, except in cases when both spouses domiciled in the Republic of Lithuania performed the marriage abroad with the purpose of evading grounds for nullity of their marriage under Lithuanian law<sup>551</sup>.

The procedure of contracting marriage under Article 1.26 of Lithuanian CC shall be determined in accordance with the law of the state where the marriage is solemnized. Marriage shall also be recognized as valid if the procedure of contracting marriage was in compliance with the requirements of the law of the state of domicile of either of the spouses or the law of the state of citizenship of either of them at the moment of solemnization of the marriage.

Whatever its merits, the position of Lithuanian law is relatively clear. Lithuanian law apparently only requires the proof of foreign law where matrimonial relief is sought and a foreign marriage must be proven in order to obtain a court's recognition and cooperation.

Nevertheless, there might be such requirement in particular circumstances, for instance, when an alien wants to register marriage in Lithuania he must submit the following documents:

1. Passport or Identity Cards (Translated into the Lithuanian language);
2. Birth Certificates (Legalized according to the established procedures and translated into Lithuanian language);

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Vilnius: Justitia, 2008, 4(70).

<sup>549</sup> TROFIMOVIEŅĖ, L., *Apie vienalytes santuokas ir jų ignoravimo pasekmes [On same-sex marriages and results of ignoring them] [interactive]*, Delfi.lt of 6 December 2010 [accessed 15-12-2010], <http://www.delfi.lt/news/ringas/lit/trofimoviene-apie-vienalytes-santuokas-ir-ju-ignoravimo-pasekmes.d?id=39362417>, (last visited May, 15, 2013).

<sup>550</sup> Under the Decree No. 28 of 21 December 2000 of the Lithuanian Supreme Court Senate and approved by Lithuanian judicial practice, by the application of private international law and summarising overview)

<sup>551</sup> For example the same-sex marriage.

3. Document proving person's right to get married (proof of celibacy), issued by the competent institution of the country of origin (Legalized according to the established procedure and translated into the Lithuanian language).

4. The application form of the Civil Registry Office.

Regarding the legalization of the foreign documents, EC regulation No 2201/2003<sup>552</sup> is in force in Lithuania, nonetheless the scope of the regulation is not wide enough to simplify the procedures required to legalize documents, such as documents proving a person's civil status (i.a. marriage certificates) or documents establishing a parent- child relationship, which still need to be legalized by the competent institution of the country of the document's origin and must also be translated into the Lithuanian language, which surely may cause some difficulties for the person wanting to prove his or her civil status<sup>553</sup>. There is a slight ambiguity about which documents fall within what documents that fall within the scope of this Regulation. In practice, public documents proving a person's civil status or parent-child relationship that were issued abroad, still have to be apostilled or legalized according to the established procedures.

Documents issued in Latvia, Estonia and Poland are exempt from any legalization requirements as a result of intergovernmental agreements between Lithuania and these states<sup>554</sup>.

It is not, however, necessary to establish the marriage's validity merely to offer evidence that it took place; it would seem that an automatic recognition may take place on the provision of a formally valid foreign marriage certificate.

There is in Lithuania no *general* requirement to register marriage entered into abroad. However, to keep his civil status up to date, a person can register his marriage in Lithuania: marriages of nationals of the Republic of Lithuania registered by institutions of a foreign state are entered into the records of the civil registry office of their place of residence in the Republic of Lithuania. Thus a marriage record entry is made and a marriage certificate is issued. Marriages of nationals without permanent residence in the Republic of Lithuania are entered by the Civil Registry Office of the City of Vilnius. The

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<sup>552</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, entered into force 01.08.2004, applicable from 01.03.2003, OJ L 338 of 23. 12. 2003.

<sup>553</sup> Especially when change of person's civil status occurred abroad.

<sup>554</sup> Lithuania has entered into an agreement concerning legal support and relationship in civil, family and criminal cases with the Republic of Latvia, Republic of Estonia and Poland.

following documents must be submitted for entry of marriage originally concluded and registered in a foreign state:

1. A copy of the marriage certificate issued by a foreign institution, certified by a notary;
2. A certified translation into the Lithuanian language and legalized, if not provided for otherwise by international agreements of the Republic of Lithuania;
3. Valid passports of citizens of the Republic of Lithuania or identity cards, a passport of a foreign national or copies thereof certified by a notary public; a receipt of payment.

An application for a marriage to be entered must be submitted to the civil registry office. Citizens living abroad may submit their application to enter marriage into the records through a diplomatic mission or consular post of the Republic of Lithuania abroad.

## II. CANON MARRIAGE AND CIVIL MARRIAGE COMPATIBILITY AND RECOGNITION PROBLEMS IN THE LAW OF THE LITHUANIAN REPUBLIC

Every State regulates the form of marriage conclusion and has special legislation to meet this purpose. The State establishes the procedure of marriage conclusion and performs this procedure by itself or gives this right to the Church. The choice of the expression “gives this right” is based on the full agreement existing in the state’s jurisprudence that within its territory the state is in all respects the highest authority, which determines laws for its citizens’ relationship<sup>555</sup>.

Church generally is focused on eternal matters, but is also concerned with mortal behaviors and moral choices that have eternal significance. The State generally claims no authority in matters that pertain to the eternal world, but guards its ultimate authority in matters that occur or have impact upon its territory, its people, and policies irrespective of their otherworldly dimensions.

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<sup>555</sup> KAVOLIS, *supra* note 187, p. 5.

At present the State regulates the conclusion of marriage related rights of the individual and recognizes the registration of marriage at the church. The Constitution of the Lithuanian Republic (Art. 38), enacted on October 25<sup>th</sup>, 1992, legitimates this recognition by providing that “The State registers marriage, birth and death. The State also recognizes the registration of marriage at the church”<sup>556</sup>. With the decree of April 21<sup>st</sup>, 1994, the Constitutional Court of the Lithuanian Republic recognized that the provision of the Article 6 of the Marriage and Family Code, “marriage is recognized only when arranged by Public Bodies of the Civil Registry” and the provision of the Article 12 “marital rights and duties are established only by marriage, arranged in Public Bodies of the Civil Registry” contradicted the part 4 of the Article 38 of the LR Constitution. The Constitutional Court<sup>557</sup> accepted that both State and Church registration of marriage, performed after the establishment of the Constitution, are separate juridical facts that have analogous legal consequences.

Lithuanian Supreme Court in civil case No.3 K-3 – 107/2005<sup>558</sup> held that recognition of church marriage is not absolute and Civil Code of Republic of Lithuania imposes some conditions for the recognition of the church marriage. According to these conditions church marriage recognition results have the same legal consequences as a civil marriage. This situation confirms the legislative gaps and the problems of church marriage and civil marriage compatibility and their mutual recognition. Therefore, this problem should be solved in the legislative level, by changing the order of registration of the church marriage, because the current provisions of the Lithuanian CC contradict to the Article 38 (4) of the LR Constitution, because in reality the State recognizes marriages, registered only by its own institutions, and these church marriages unregistered in a Civil Registry remain without recognition.

Civil law recognizes only that confessional marriage, which meets the state requirements which are provided in articles 3.12 to 3.17 of the Civil Code. The State would not recognize the confessional marriage, which fails to meet the requirements of Civil law. At present the legislation of the Lithuanian Republic recognizes the marriages concluded

<sup>556</sup> Lithuanian Republic Constitution. Art. 38.

<sup>557</sup> Lietuvos Respublikos Konstitucinio Teismo Nutarimas „Dėl Lietuvos Respublikos Santuokos ir Šeimos Kodekso 6 Straipsnio Antrosios Dalies, 11 Straipsnio ir 12 Straipsnio Antrosios Dalies Atitikimo Lietuvos Respublikos Konstitucijai“, 1994, V. Ž. 31 – 562. [The Decision of Constitutional Court of Lithuanian Republic ‘Due to Marriage and Family Code of Lithuanian Republic, Article 6, Second Part’s, Article 11 and 12, Second Part’s Congruence to Constitution of Lithuanian Republic’, 1994, V. Ž. 31 – 562 (Lt.)].

<sup>558</sup> Lithuanian the Supreme Court civil case No. 3 K-3 – 107/2005.



by state-recognized religious associations and communities.

The Catholic Church has taken a special part in the development of the Lithuanian national moral values and has made significant contributions to the social, cultural and educational life of the State. The majority of the LR citizens profess the Catholic religion. In light of the above-mentioned facts and following the provisions of the LR Constitution, the Lithuanian Republic has made an agreement with the Holy See that from the very moment of its religious concluding the canon marriage shall cause civil consequences in the legal order of the LR, provided the requirements of the corresponding LR laws are met<sup>559</sup>. Both Civil and church laws recognize that marriage is concluded by mutual consent of both spouses and agree that it can be registered and “administrated” only in accordance with legal rules.

However, in Lithuania, the Catholic Church, as well as other denominations confessions, is not ready to conduct the registering of marriage to the required high standard. The Lithuanian Bishops’ Conference has presented a document to the Government explaining that they are not ready to perform marriage registration. Therefore, the Church only blesses the marriage and leaves the registration to be completed by the Civil Registry offices. This provision was specified by the Bishops’ Conference held on November 12<sup>th</sup>, 1996 by confirming the programme of the Preparation for the Marriage Sacrament, which was introduced on March 31<sup>st</sup>, 1997. According to this programme, the Roman Catholic Church only blesses the marriage, while the certificate it issues has to be registered in a Civil Registry office by one or both of the spouses<sup>560</sup>.

The temporary registration rules of the Civil Acts, issued on April 1<sup>st</sup>, 1999, provide that “when it is requested by spouses, the marriages arranged by religious licence after November 2<sup>nd</sup>, 1992, are recorded in the Civil Registry office by writing up a marriage record and issuing a marriage certificate and by noting it in the spouses’ passports”<sup>561</sup>. Civil Registry offices record only the marriages concluded under a Church

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<sup>559</sup> Lietuvos Respublikos ir Šventojo Sosto sutartis “Dėl santykių tarp katalikų bažnyčios ir valstybės teisinių aspektų” 13 str. Lithuanian Republic Agreement “Due to relations between Catholic Church and the State legal aspects”, Art. 13//State news. No. 89-1985. 2000.

<sup>560</sup> Under the new Order of Minister of Justice „Due to Approval of the Rules of Civil Registry”, 2012 03 26, No. 1R- 92, State News, 2012; No. 37-1837, article 72<sup>2</sup> from 2012 06 01 to notify Civil Registry office about the religious marriage per ten day period must a representative of the church. The same order, article 72<sup>3</sup> provides that the second certificate of church marriage may also be brought by the spouses or one of them. Church representatives do not accept any responsibility for the marriage certificate of non-delivery to Civil Registry office on time. For the damages originated from this situation spouses may apply to the court.

<sup>561</sup> Order of Minister of Justice „Due to Notification about Marriage, Registered According to Church’s

that follow the requisition of the LR Marriage and Family Code.

According to the standing order the marriage concluded in the church does not create consequences in civil law, which means there are neither duties nor rights created. The State would recognize the religious marriage registration, but the Church does not keep such records to the required standard<sup>562</sup>. This position of the Church can be based on the theory that the Church concentrates on marriage as a sacrament, thus considering the law to be of the secondary importance. Both the Church and the State recognize that the spouses' agreement is sufficiently assured for a valid marriage. For such a marriage to be accepted as valid in the public field and by public institutions, it is necessary that the proof the religious conclusion would be registered as having affects in the civil law. The marriage concluded in the church brings civil consequences only after its registration in the civil registry. At this point the marriage is recognized to be retro-actively valid from the moment it was concluded. It then by legitimated children and validates the other juridical consequences that have occurred since the moment of marriage conclusion<sup>563</sup>.

Under the current law, the Lithuanian Republic does not recognize religious marriage from the date of its conclusion until the registration, but once registered a confessional marriage is recognized and does not require a new civil procedure.

The practice of courts on this issue is not very rich and in similar cases the decisions of courts differ. For example, the Supreme Court of Lithuania<sup>564</sup> in 2005 held that the legal consequences of the marriage will arise only after its registration in the Civil Registry. In the another civil case<sup>565</sup> in 2000 it was held a decision that spouses rights and duties arise from the day of canon marriage registration without it reregistration in the Civil Registry. In civil case No. 3 K-7 – 430/2001<sup>566</sup> in the 2001 the Supreme Court however held that church marriage reregistration in the Civil Registry is obligatory for validity of the marriage.

The Lithuanian Civil Code (Article. 3.24) provides the conditions for recognition of the marriages concluded in the church. But legal disputes arise concerning this public

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(Confession) Determined Order and Confirmation of Form and Notification Order“, *supra note* 460.

<sup>562</sup> In the Countries where civil law recognizes a marriage through the Church (e.g. Italy) the marriage through the Church must be registered in a civil institution even though it gains the consequences in law from the moment of its conclusion.

<sup>563</sup> But on condition the registration was done within 10 days.

<sup>564</sup> Lithuanian the Supreme Court civil case No. 3 K-7 – 563/2005.

<sup>565</sup> Lithuanian the Supreme Court civil case No. 3 K-3 – 462/2000.

<sup>566</sup> Lithuanian the Supreme Court civil case No. 3 K-7 – 430/2001.

registration order of the marriages concluded in the church. The Lithuanian Civil Code (Article 3.312) provides the ten-day period during which the religious marriage should be registered in the Civil Registry. If this registration takes place after the ten-day period has expired, the marriage is considered to be concluded on the day it is registered in the Civil Registry. Submission of the documents of the religious marriage registration to the Civil Registry Office after 11 or 20 days should normally not cause any big problems to the spouses, unless there would be a consequential and unforeseen event, such as birth of a child or death of a partner. But what is the case if the documents are delivered after ten or more years? The latter period is long enough for a number of legally relevant facts and actions to occur, e.g. acquisition, administration and loss of property, and most certainly the birth of children, death of a spouse, etc. It is not difficult to determine who is to blame for the failure to submit the marriage registration documents. It however becomes impossible to recover the recognition for civil consequences of the marriage retrospectively. As long as they will have failed to submit the documents of their religious marriage registration the spouses, although considering themselves as a family with all the pertinent rights, actually do not have even the guarantees, which are provided to a cohabiting couple under the civil law<sup>567</sup>, as they have not registered their union as provided by the Article 3.229 of the LR Civil Code. Due to the non-existence of marriage the paternity of the children is not recognized and has to be proven (recovered) following the set order<sup>568</sup>.

Such repudiation of religious marriage prevents retrospective validity of its legal consequences, restricts the rights of the individuals, who have concluded marriage in the church and becomes the reason of various juridical problems and inconveniences. For example, if individuals marry only in the church and do not register their marriage in the Civil Registry in time, for example, for the negligence of the Church representative or for the sudden death of a spouse, according to the Civil law, the widow or widower has no rights to inheritance or other rights (surname, widow's pension, etc.) related with the dead spouse, because the state does not recognize such marriage. In this hypothesis we see, indeed, that Lithuanian civil law does in no way honour the church marriage.

To prove the topicality of this problem an example from the Lithuanian court practice is presented. In civil case the Juridical Board of the Civil Case Division Court in

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<sup>567</sup> LR CC. Art. 3.230 – 3.235. CC.

<sup>568</sup> Art. 3.140.

appellant written order investigated the separate complaint from K. R., the representative lawyer of the declarant G. V. The complaint was against the decision of October 1<sup>st</sup>, 2004, made by the Utena Regional Court, to refuse to accept a petition to void the determination of the fact of legal significance<sup>569</sup>. The declarant G. V. presented the petition to the Regional Court, asking to determine the legal implications with the fact, that the legal marriage between G. V. and K. V. M. was registered in the church, on August 23<sup>rd</sup>, 1996. The lawyer of G. V. also noted that, due to the ignorance of the parties about the law, the marriage was not registered in the Civil Registry Office. After the conclusion of marriage the complainant and K. V. M. lived together and managed their marital property. The husband died on July 18<sup>th</sup>, 2004. After his death, the Regional Registry Office refused to register the marriage. With a separate complaint the complainant's lawyer K. R. asked the Regional District Court to cancel the judgement made on October 1<sup>st</sup>, 2004 and to retry the case. According to the Item 55 of the Civil Registry Rules, confirmed by the order No. 129 of the Attorney-General of the Lithuanian Republic on June 29<sup>th</sup>, 2001, a religious marriage contracted after November 2<sup>nd</sup>, 1992 is allowed to be registered, but only if both spouses are alive. As one of the spouses K. V. M. was deceased, the Civil Registry Office of the region refused to register the marriage concluded in the church. There is no other legal remedy to obtain a document confirming the fact of this marriage registration. Therefore, the separate complaint was ignored and the decision from the First Instance Court remained in force.

According to the specialist of church and civil law, professor K. Meilius<sup>570</sup>, there can be some difficulties in determining the time of the religious conclusion of a marriage. For example, if one of the spouses dies during the ten-day period after marriage conclusion in the church before this marriage is registered in the Civil Registry. In such a case, the mentioned marriage should cause consequences in law from the day it was concluded in the church, as religious marriage is effective or not effective from the moment of its concluding and it cannot be concluded *sub conditione de futuro* (can. 1102)<sup>571</sup>. Moreover, according to Article 3.28 Civil Code, spouses create family relations as a ground for their mutual life, based on the spouses' equality, their capability, obligations to each other,

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<sup>569</sup> Lithuanian case. Genovaitė Voverienė and Kęstutis Rakauskas v. Judgement of Utena Regional Court, 2 A- 7 – 481 (A.C. C., 2004).

<sup>570</sup> MEILIUS, *supra* note 292, p. 46.

<sup>571</sup> *Id.*, p.48.

childcare, etc. The marriages concluded in the Catholic Church without *bonum coniugum*, *bonum prolis*, *bonum fidei* would not be valid (CIC '83, can. 1055; 1101). Therefore, in every case of litigation before a canonical court, if the marriage is arranged without violation of canon law, the Spiritual Courts consider it valid and leave it registered with consequences in canon law.

The documentation of religious marriages may also give rise to legal objections. Having failed to register a church marriage to the Civil Registry office within the ten-day period, the date when spouses apply for the registration of marriage is written in the marriage certificates. In such a situation, the religious marriage, valid before that date, is considered legally ineffective. In this case the Civil Code contradicts the recognition of religious marriage guaranteed by the Constitution and this is assessed as contravention of the law and a legislative gap. The question arises: what marriages are registered by the Civil Registry Office? The ten day period, during which the marriage by religious licence has to be registered, is open to criticism as there is no possibility foreseen to prolong this period, e.g. if facts occur that are beyond the control of the parties' will (illnesses and other reasons, which a court would consider important).

There are some uncertainties related to the ten-day period, during which the religious marriage has to be registered. The ten-day period, determined by law, is not clearly motivated; the aim of this provision is not clear; therefore, the necessity of this term is questionable. According to V. Brilius, a specialist of the church marriage law, it is just a disciplinary provision to keep marriage registration operative and accurate. Then, if this provision is violated, the denial of recognizing the marriage from the date of its conclusion until its recognition is construed as a penalty, although such actions are deemed unreasonable and illegitimate. Administratively of the church marriage has to be presented to the Civil Registry Office by the church unit, which has assisted the marriage, and which is subject to a penalty for the failure to perform this duty. But in such cases the spouses' marriage is not recognized, despite the fact that the spouses are not guilty of failing to present their marriage documents in time and, even, if they were not informed about this obligation. Additionally, such a penalty is irrational and disproportional. The law does not define it as a penalty; therefore, repudiation of the marriage period from its conclusion until the registration in the Civil Registry, presuming the ten-day period was exceeded, is

not considered as a disciplinary punishment<sup>572</sup>.

Problems of religious marriage recognition and compatibility appear when an annulment is required. The Church recognizes marriage as only dissolvable by death and does not release spouse from valid marriage, except in very rare cases of “*ratum non consumatum*” and “*privilegium Paulianum*”. However, due to strict Church requirements for conclusion of valid marriage, the Spiritual Court sometimes recognizes the marriage as invalid (as being a non-marriage). The laws in force in the Lithuanian Republic do not contain such cases. A marriage, deemed invalid by church law, is not deemed invalid by civil law. The theoretical question is: on what basis does the State recognize the marriage, which is not concluded in civil order, and the one concluded in a church as not valid? In the case of civil annulment of a religious marriage the State recognizes that the marriage no longer exists, however, the Church still views this marriage as valid. By the deletion of the marriage concluded in church from the registration list the state abandons its recognition. This is considered as a direct violation of constitutional guarantees to the recognition of religious marriage. The church marriage should namely be completely valid in civil law and annulment of only the civil marriage causes antinomy between the Constitution and the Civil Code. Article 3.24 of the Civil Code provides church marriages have the same legal consequences as civil law marriages do. However, the civil law provisions regulating the termination of marriage do not distinguish between civil and religious marriage. When a marriage is concluded in the church and registered into the marriage records, the spouses qualify for individual moral and property rights and duties, provided in the Civil Code.

Courts are misled by irregularities and gaps in the legislation. For example, according to the decision of civil case given on April 20<sup>th</sup>, 2004, the Juridical Board of the Civil Case Division of Lithuanian Panevėžys District Court in a written process order adjudicated a separate complaint from A. J. in regards to the decision of the Utena Region District Court, made on February 18<sup>th</sup>, 2004 in this civil case in consonance with the petition of A. J. and R. J. in marriage termination by mutual agreement and verification of treaty due to marriage termination sequence<sup>573</sup>.

The declarants A. J. and R. J. applied to the Utena Region District Court, asking

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<sup>572</sup> BRILIUS, *supra* note 216, pp. 53-54.

<sup>573</sup> Lithuanian Case. A. Juškevičienė & R. Juškevičius v. Zarasai Region Civil Registry Office, 2 A- 152 – 02/2004 (A. C. C. . 2004).

to declare their marriage invalid by the agreement of the spouses. The marriage was registered in the Zarasai Region Civil Registry Office on August 22<sup>nd</sup>, 2000. However, the Utena Region District Court rejected the case, since the marriage of the declarants was concluded at the Antalieptė church on June 15<sup>th</sup>, 2000. This marriage was registered in accordance with the law in the Zarasai region Civil Registry office; the marriage certificate was also issued. The court decided that religious marriage, registered in the Civil Registry office according to the existing procedure, cannot be cancelled by the court, because the termination of marriage is regulated by the rules and rights of the church law. The declarant A. J. then entered a separate complaint asking to cancel the decision of the Utena Region District Court made on February 18<sup>th</sup>, 2004 as illegal and perverse, asking for a retrial with the same magistrate. He alleged that the Court of First Instance gave unsatisfactory motivation and a wrongful application of the rules of material law, which resulted in violation of the legal process on the termination of a marriage registered in the Civil Registry, and a violation of the consequences of this termination. The motion of declarant was successful, the judgement was cancelled and a retrial was granted with the same magistrate.

As a practical consequence this situation shows the violation of the Constitutional rights guaranteed to the Church, as the marriage is claimed to be religious but it is the State that makes the decision to deny it validity. The existing legislation does not honour the Church's wish to terminate the religious marriage only in the Spiritual Courts. At present, both religious marriages and civil marriages are terminated by civil courts.

The other problem is that the Lithuanian Civil Code does not provide clear documentation of civil and religious marriages; therefore, the establishment of a marriage register is necessary. The CC does not define the legal consequences arising from the conclusion of church marriage in disagreement to the state marriage requirements.

### III. CANON AND CIVIL MARRIAGE VALIDITY AND RECOGNITION IN COMPARATIVE FAMILY LAW

Around the world today there is a wide variety of approaches to balancing the claims of and conflicts between Church and State concerning the regulation of marriage, from purely secular (prohibiting religious celebration or any civil recognition of religious regulation), to primarily religious (giving full civil law effect only to marriages that have been celebrated according to religious regulations). Increasingly, also, there are sharp conflicts in western nations between civil and religious communities regarding same-sex marriage regulation across a broad range of issues impacting religious organizations, public employees, and private individuals.

A marriage is usually formalized at a wedding or marriage ceremony. The ceremony may be officiated either by a religious official, by a government official or by a state approved celebrant. In many European and some Latin American countries, any religious ceremony must be held separately from the required civil ceremony. Some countries – such as Belgium, Bulgaria, France, the Netherlands, Romania and Turkey<sup>574</sup> require that a civil ceremony take place before any religious one. In some countries – notably the United States, Canada, the United Kingdom, the Republic of Ireland, Norway and Spain – both ceremonies can be held together; the officiant at the religious and civil ceremony also serving as agent of the State to perform the civil ceremony.

All human beings have multiple *loyalties* because they belong to multiple communities. Examples of such communities include national communities, regional/local communities, ethnic or tribal communities, religious communities, professional, vocational, or industrial communities, family communities (both extended and nuclear), etc. Those communities exercise a form of “jurisdiction,” broadly speaking, over the members of the community<sup>575</sup>, meaning “the power or right to exercise authority” and “the power right, or authority to interpret and apply the law<sup>576</sup>”.

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<sup>574</sup> Turkish Civil and Penal Code Reforms from A Gender Perspective: The Success Of Two Nationwide Campaigns, Istanbul, 2005, <http://web.archive.org/web/20061231021938/http://www.wwhr.org/images/CivilandPenalCodeReforms.pdf>, (last visited May, 15, 2013).

<sup>575</sup> The submission to the jurisdiction of a community may be largely voluntary, as in the case of religious communities, or largely coercive as in the case of the state asserting unwanted criminal or civil jurisdiction over a defendant in court, or the assertion of jurisdiction may be a hybrid of partly voluntary but partly



Multiple communities may claim an interest in regulating certain behaviors, such as marriage. Thus, families, church communities, and State officials may all claim some jurisdiction over the creation of marriage via family traditions, religious rites, and state laws. The rules of different communities sometimes create diverse, inconsistent, even conflicting, obligations for individuals who belong to multiple communities.

For example, when the rules of one community require certain behavior (such as religious celebration), but the rules of another community prohibit that behavior (such as state law requiring state formation first or exclusively), so there is potential for conflict between those communities. When membership in multiple communities overlap, that is, when some individuals belong to two or more communities with inconsistent or conflicting rules, a situation of conflicting loyalty is created with the potential for cognitive dissonance that can threaten both individual and community integrity.

In different countries<sup>577</sup>, where the forms of both civil marriage and canon marriage are acceptable, the period and order of religious marriage registration vary. For example, Article 58 of the Civil Law of the Latvian Republic determines the fourteen-day period, in which the representatives of the Church have to present the data necessary for marriage registration to the Civil Registry department about every marriage concluded in the territory of this department. Failure to carry out this obligation brings administrative proceedings.

In Spain the State recognizes the civil effects of marriages celebrated according to canon law. Canon marriage is considered legal under civil law from the moment of the celebration. For full recognition of these effects, the marriage must be registered in the civil registry; this may be done with the presentation of the church certificate of the existence of the marriage. The marriage partners, in accordance with the provisions of canon law, may go to the Ecclesiastical Courts to request a declaration of annulment or to request a pontifical decision concerning a valid but unconsummated marriage. By request

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involuntary.

<sup>576</sup> See *Jurisdiction* in Merriam-Webster's Online Dictionary, <http://www.merriamwebster.com/dictionary/jurisdiction>, (last visited September 26, 2013); *Jurisdiction* in Oxford English Dictionary (Online), [http://dictionary.oed.com.proxylaw.byu.edu/cgi/entry/50124816?single=1&query\\_type=word&query\\_word=jurisdiction&first=1&max\\_to\\_show=10](http://dictionary.oed.com.proxylaw.byu.edu/cgi/entry/50124816?single=1&query_type=word&query_word=jurisdiction&first=1&max_to_show=10), (last visited September 26, 2013); Law Encyclopedia: *Jurisdiction* ("generally describes any authority over certain persons."), available at <http://www.answers.com/topic/jurisdiction>, (last visited September 26, 2013).

<sup>577</sup> EU countries where church marriage is recognized by State: Lithuania, Latvia, Estonia, Spain, Italy, Cyprus, Greece, Denmark, Sweden, Poland, the United Kingdom, Ireland, Portugal, Malta, Finland, Slovakia, Czech Republic.

of either of the parties, said ecclesiastical resolutions shall be considered valid under civil law if declared in compliance with state law by a sentence of the competent Civil Court. The Holy See reaffirms the permanent value of its doctrine concerning marriage and reminds those who celebrate marriage in accordance with canon law of the serious obligation they assume to abide by the canon rules regulating marriage and, especially, to respect their essential meaning<sup>578</sup>.

The State of Portugal recognises the validity of civil marriages celebrated according to canon law on condition that the act of marriage has been registered in the appropriate State Register. Wedding bans should be published not only in the respective parish churches but also in the competent registry office. Weddings conducted under urgent circumstances on the point of death, at the point of childbirth, or requiring immediate celebration on the express authority of an Ordinary in serious cases of a moral nature, may be contracted independently of the prior publishing of bans. The parish priest shall pass on an unabridged copy of the marriage [record] within three days of the act to the competent registry office for the purposes of registration: the transcription must be made within two days and communicated by the respective parish official within the day immediately following that on which it was transcribed, with a note of the date<sup>579</sup>.

Marriage according to canon law in Croatia<sup>580</sup>, from the moment of its celebration, shall enjoy the benefits of civil law according to the legal norms of the Republic of Croatia if there are no civil or contrary impediments and if they meet the legal requirements established by the Republic of Croatia. The means and the period within which marriage registration may be undertaken are laid down by the respective laws of the Republic of Croatia. The canonical marriage in Croatia, according to the Art. 13, paragraph 1 of the Treaty, has legal effect, however, upon two conditions: 1) that there are no impediments on the part of the future spouses; and 2) that all conditions provided for in Croatian legislation are fulfilled. Consequently, in order to conclude a valid canonical marriage the required conditions have to be fulfilled in both canonical and Croatian family law. In other words, a marriage can be solemnized in religious form only if it can be

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<sup>578</sup> Agreements Between the Spanish State and the Holy See, Agreement of 28 July 1976, (ratified 19 August 1976; B.O.E. no. 230, 24 September 1976).

<sup>579</sup> Concordat with the Holy See and the Portuguese Republic 18 May 2004, The Holy See and the Portuguese Republic, Art. 13.

<sup>580</sup> Agreement between The Holy See and the Republic of Croatia on Legal Questions (1996). Signed the 19 December 1996, Art. 13.

solemnized in civil form too<sup>581</sup>. According to Croatian doctrine, registration of religious marriage in the civil registry is not a precondition for canonical marriage to have civil effect<sup>582</sup>. If, for the marriage solemnized in religious form, the preconditions provided in Articles 8 and 20 of the Croatian Family Act (FA) are not fulfilled, the officer of civil status is not allowed to register such a religious marriage in the civil registers<sup>583</sup>.

In Italy civil effects shall be recognized for marriages contracted according to the norms of canon law, provided that the act of marriage is entered in the civil registers, and the notices of marriage have been previously published at the communal offices. Immediately after the ceremony, the parish priest or his delegate shall explain the civil effects of the marriage to the parties, by reading the Articles of the Civil Code concerning the rights and duties of married people and he shall thereafter draw up, in original duplicate, the certificate of marriage, in which the spouses' declarations permitted by civil law may be inserted. The Holy See acknowledges that the registration shall not take place: (A) When the spouses do not meet the requirements of age determined by civil law for celebration; (B) When an impediment from which, according to civil law, no derogation is permitted, exists between the spouses. The request for registration shall be made, in writing and within five days from the celebration, by the parish priest of the place where the marriage has been celebrated. If the conditions for registration are satisfied, the civil registry officer shall record it within 24 hours from the receipt of the act and shall give notice thereof to the parish priest. The marriage shall have civil effects from the moment of the celebration, even if the civil registry officer has, for any reason, made the registration after the prescribed term. The registration can also be made subsequently, upon request of the two spouses or of one of them with the knowledge and without the opposition of the other, provided that both have retained single status without interruption from the moment of the celebration to the request for registration and the rights legally acquired by third parties are not prejudiced<sup>584</sup>.

Civil effects for canonical marriage are recognized in Malta, according to the

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<sup>581</sup> TOMLJENOVIC, V., *The International Survey of Family Law*, Antwerp: Intersentia, 2003, p. 111.

<sup>582</sup> ALINČIĆ, M., HRABAR, D. and BELAJEC, V., *Commentary on Family Act*, Zagreb: Narodne Novine, 1999, p. 16.

<sup>583</sup> *Id.*, at 81.

<sup>584</sup> Agreement between the Italian Republic and the Holy See Signed by the Italian Republic and the Holy See on 18 February 1984. Ratified by the Italian Parliament on 25 March 1985. Reproduced with permission from 24 I.L.M. 1589 (1985).

Treaty between Malta and the Holy See<sup>585</sup>, if canonical marriage is registered in the marriage registry and if it was previously announced according to the civil family law. Here problems of private international law may arise since the parties in question may have gone through a marriage ceremony abroad which, even though valid according *lex loci celebrationis* or by the law of the domicile, does not create the status of marriage according to Maltese law rules or English common law rules. In such an instance the complexity of the rules regarding the validity of matrimonial unions in the private international law field becomes apparent. Part 18 of the Marriage Act of 1975 provides that

"A marriage, whether celebrated in Malta or abroad, shall be valid for all purposes of law in Malta if:

(a) As regards the formalities thereof, the formalities required for its validity by the law of the country where the marriage is celebrated are observed; and

(b) As regards the capacity of the parties, each of the persons to be married is, by the law of the country of his or her respective domicile capable of contracting marriage<sup>586</sup>." The formal validity of marriages celebrated in Malta or abroad is thus tested by the *lex loci celebrationis*. Under the Marriage Act of 1975, every marriage in Malta must be tested according to the country in which it took place, and if it is found to be valid by the laws of that country, then insofar as the formal validity is concerned, such marriage would be valid independent of where it was celebrated, throughout the globe. This would continue to hold even if the ceremony or proceedings constituting the marriage were not valid according to the laws of the country of domicile of one or both spouses. If, on the other hand, a marriage is not valid according to the laws of the country in which it is celebrated, then that marriage will not be valid according to Maltese marriage laws<sup>587</sup>. For the substantial validity the combined laws of the countries of residence of the spouses must be respected.

The same solution can be found in the Estonian Treaty with the Holy See, according to which the civil effects of canonical marriage are recognized as long as the latter is validly registered (Article 8)<sup>588</sup>.

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<sup>585</sup> Marriages celebrated in the Catholic Church, upon registration and for which a certificate of marriage has been issued by the Civil Registry office, have civil effect: Article 8 of the Treaty between the Holy See and the Republic of Malta Concerning Canon Marriage of 2 February 1993, AAS 89 (1997), pp. 679-694.

<sup>586</sup> Marriage Act of 1975. Section 18.

<sup>587</sup> The case *Court v. Ernest Stanley Kesslake* (1934) was an exception to this rule with the result that an essential clarification in Maltese private international law rules became due.

<sup>588</sup> Marriage celebrated in the Catholic Church, upon registration and for which a certificate of marriage has been issued by the Civil Registry office, have civil effect: Article 8 of the Treaty between the Holy See and

In Poland from the moment of solemnisation, matrimony according to canon law shall be subject to such effects as a marriage contracted according to Polish law, if

- 1) Between the spouses there exist no impediments according to Polish law;
- 2) Upon the solemnisation of marriage the persons concerned make a joint expression of will to such effect and;
- 3) The solemnisation of marriage has been registered in civil registers and notice has been served at the State Civil Registry within five days from the solemnisation of the marriage; this time limit may be prolonged, should it not have been observed due to *force majeure*, until such time as the situation is resolved. Preparation for the celebration of marriage according to canon law shall involve instructing the spouses on the indissolubility of canon law marriage and on the legal provisions of Polish law concerning the effects of marriage<sup>589</sup>.

To avoid any implication that the State is "recognizing" a religious marriage (which is prohibited in some countries) – the "civil" ceremony is said to be taking place at the same time as the religious ceremony. Often this involves simply signing a register during the religious ceremony. If the civil element of the religious ceremony is omitted, the marriage ceremony is not recognized by government authorities as a marriage under the law.

#### IV. RELIGIOUS MARRIAGES AND THEIR RECOGNITION IN LITHUANIA AND OTHER COUNTRIES' LEGISLATIONS

##### A. VALIDITY OF EXTRATERRITORIAL CANON MARRIAGES

The religious law of certain churches claims universal application. Priests or ministers authorised by such law to solemnize marriages are entitled to do so in their Church without territorial limitation as to the spouses' particular country of origin. To some extent such claims to universal competence are endorsed by secular law in the sense

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the Republic of Estonia adopted in Tallinn on 23 December 1998 and in the Vatican on 15 February 1999.

<sup>589</sup> Concordat between the Holy See and the Republic of Poland, Signed 28 July 1993. [Ratified 23 February 1998], Art.10.

that certain states are prepared to recognise marriages of their nationals or domiciliary, as the case may be, so solemnised outside their territory.

Advocates for the extraterritorial nature of the Concordat argue that canon law regulates marriage as a sacrament, which is of universal value and therefore, by its nature, excludes any territorial character, meaning it is not concerned or limited by the domicile or nationality of the engaged couple<sup>590</sup>. Canonical marriage has sacral character which excludes any territorial limitations<sup>591</sup>. On the other hand some authors argue that the Concordat is an international treaty which regulates relations between the State and the Holy See, and therefore regulates relations arising out of a specific State territory. In legal theory it is argued that the Concordat can't be treated as an international contract because of the lack of its legal nature, since its basis is a moral and not a legal obligation<sup>592</sup>.

As with domestic marriages, observance of a religious form may, from the point of view of the personal law, be either compulsory or optional. In either cases the State of the personal law may, and often does, lay down special conditions, for example as regards publication of bans or registration of the marriage, which must be observed by the solemnising official and which may differ from those applicable to purely domestic marriages. Sometimes these conditions include a requirement of approval on the part of the State in which the celebration takes place and of validity of the marriage in that State. Usually, however, no such regard is paid to the State of celebration. However this may be the form followed by the solemnising official is that of the law from which he derives his authority, including such special provisions as may be applicable to extraterritorial marriages<sup>593</sup>.

Traditionally accepted in comparative private international law that a form of marriage is subject to *lex loci actus* (*lex loci celebrationis*) which means, that marriage is valid in its form if it is valid according to the law of the State where it is celebrated. Such a solution is accepted in Art. 3.24 of the Lithuanian Civil Code. The validity of canonical marriage is subject to numerous procedural and material requirements, such as registration of such a marriage (see above). In that case, its validity, where its form is concerned,

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<sup>590</sup> FINOCCHIARO, F., *Matrimonio in Enciclopedia Del Diritto*, Milano: Periodica De Re Canonica, 1975, p. 859.

<sup>591</sup> BALLARINO, T., *Il Matrimonio Concordato Nel Diritto Internazionale Privato*, Guevara: Tito Studi, 1964, p. 821.

<sup>592</sup> FALCO, M., *Concordato Ecclesiastico*, Torino: Utet, 1938, p. 656.

<sup>593</sup> PÅLSSON, *supra* note 259, p. 242.

depends on later recognition of that marriage through inscription in the registers of a civil registry. An important factor is also the fact of whether the country where marriage is celebrated recognizes or does not recognize the religious form of marriage. Therefore, if the marriage is validly contracted in a foreign country in religious form, such marriage should be recognized as valid, but in order to produce civil effects in Lithuania, it should be entered into the registers of civil registry in that country of its conclusion or “origin”. If, on the contrary, in the foreign country the civil form of marriage is obligatory, then a marriage celebrated in religious form can’t be recognized as valid according to Lithuanian law.

Another question in the sphere of the private international law with regard to canonical marriages refers to the question of capacity to marry. Capacity of physical persons is traditionally subject to the national law of the person in question. *Lex nationalis* is applicable for substantial elements of canonical marriage as well<sup>594</sup>.

There are certain countries<sup>595</sup> which hold a religious solemnisation to be essential whenever one of the parties to the marriage is a national of theirs, regardless of the place of celebration. Wherever in the world a Greek or Spanish (Catholic) national wishes to marry, solemnisation in the proper religious form is not only sufficient but also necessary for the validity of the marriage in his home country. The position taken by the *lex loci celebrationis* or by the personal law of the other party, if different, is immaterial<sup>596</sup>.

This system does not prevail in all countries in whose domestic law a religious solemnisation is compulsory, some of those countries being prepared to recognise marriages of their citizens which comply as to form with the *lex loci celebrationis*<sup>597</sup>.

Some countries whose domestic law provides for a religious form, or different religious forms, of marriage allow their nationals marrying abroad to use such forms as an alternative to the local form prevailing in the country of celebration. One example of this is afforded by Israeli law, pursuant to which a marriage solemnised in accordance with the rites of Jewish law is valid, irrespective of the place of celebration and the laws there in force<sup>598</sup>. This case is noteworthy in that observance of that form is only optional, although

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<sup>594</sup> BALLARINO, *supra* note 591, p. 821.

<sup>595</sup> The most important for Catholics being Greece and Spain.

<sup>596</sup> PÄLSSON, *supra* note 259, p. 242.

<sup>597</sup> English cases where foreign elements have been present but seem to have been ignored by the courts, *Webb and Latham Brown* 953 n. 20.

<sup>598</sup> SCHEFTELOWITZ, E., *Das Religiöse Eherecht im Staat*, Berlin: Heymann, 1970, p. 162.

religious solemnisation is obligatory for marriages taking place in Israel<sup>599</sup>.

The domestic law of Italy and Portugal contains provisions, going back to the concordats concluded with Holy See<sup>600</sup> in 1984 and 2004 respectively, on recognition of “Catholic marriages”, that is to say, marriages celebrated before ministers of the Catholic Church<sup>601</sup>. Such marriages are subject to a special regime, differing from that applicable to civil marriages, as regards the conditions and formalities of their creation as well as their dissolution. As concerns the extraterritorial application of these provisions, however, the position is different in the two countries.

Assuming that a Lithuanian national and foreigner would like to enter into marriage in Lithuania and they choose religious solemnization, concerning the issue of preconditions for the existence of marriage or marital prohibitions, besides the application of canon law, the law of the spouse’s nationality also has to be applied. Since the minister of the Catholic Church will apply canon law, it will be for the state authorities to determine whether all provisions of national law are satisfied.

## B. ISLAMIC MARRIAGES AND POLYGAMY

In order to validate the research hypotheses that I have proposed in the Introduction and to disclose similarities and differences of the Church and State attitude to the religious marriages and their recognition in Lithuania and other EU countries<sup>602</sup>, in the next chapter of this work, I will introduce possibilities of religious marriage recognition under the Muslim Family law, and also shortly will present some aspects of the recognition of other religious marriages.

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Polygamy includes *polygyny*<sup>603</sup> and *polyandry*<sup>604</sup>. The latter form of polygamy is

<sup>599</sup> Marriages celebrated in the form of the foreign *lex loci celebrationis* being also recognised, even for parties of Israeli nationality.

<sup>600</sup> Lithuania concluded this contract on 16 September 2000.

<sup>601</sup> Concordat between the Italian Republic and the Holy See Signed by the Italian Republic and the Holy See on 18 February 1984. Ratified by the Italian Parliament on 25 March 1985. Reproduced with permission from 24 I.L.M. 1589 (1985); Concordat with the Holy See and the Portuguese Republic 18 May 2004, The Holy See and the Portuguese Republic.

<sup>602</sup> Mostly Germany and France as these countries have a large Muslim population and have a great experience in the field of the religious marriages recognition.

<sup>603</sup> Polygyny (from neo-Greek: πολύ *poly* "many" and γυνή *gynē* "woman") is a form of polygamy, where a male has more than one recognized female sexual partner or wife at the one time. It is distinguished from a



rare and has in any case been of little significance in the conflict of laws.

The Muslim scripture, the Quran, is the only known world scripture to explicitly allow and simultaneously limit polygamy and place strict restrictions upon its practice:

“... marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly with them, then only one.” (Quran 4:3).

The Quran limited the maximum number of wives to four<sup>605</sup>. In the early days of Islam, those who had more than four wives at the time of embracing Islam were required to divorce the extra wives<sup>606</sup>. The Lebanese Civil Code in the Article 14 recognizes this number –four– as the maximum number of women with which a man can be married of simultaneous form. In Algeria, the polygamy is allowed with the assent of other wives<sup>607</sup>. In the Iraqi Civil Code, polygamy is prohibited except judicial authorization that can only be granted if it answers to a legal interest and the husband can support economically all the wives<sup>608</sup>. The polygamy is admitted and recognized by the Article 40 of the Civil Code of Morocco. It is a possibility, requesting authorization to the court providing no injustices were to be done to the other existing wives and that there was no clause introduced by the first wife, prohibiting to the husband to marry another wife<sup>609</sup>. Islam further reformed the institution of polygamy by requiring equal treatment to all wives. The Muslim is not permitted to differentiate between his wives in regards to sustenance and expenditures, time spent with them, and other obligations of the husband. Islam does not allow a man to marry another woman if he will not be fair in his treatment. Prophet Muhammad forbade discrimination between the wives or between their children<sup>610</sup>.

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man who has a sexual partner outside marriage, such as a concubine, casual sexual partner, paramour, or other culturally recognized secondary partner. Polygyny is the most common form of polygamy.

<sup>604</sup> Polyandry is a form of polygamy in which one woman is married to several men. It's occurrence is rare and assumes a specific concentration in the Himalayan areas of South Asia. However, it is sporadically distributed in Africa, Oceania, and Native America. Two forms have been recorded: fraternal polyandry in which a group of brothers share a wife, and non-fraternal polyandry in which a woman's husbands are not related.

<sup>605</sup> Even though we see the clear permissibility of polygamy in Islam, its actual practice is quite rare in many Muslim societies. Some researchers estimate no more than 2% of the married males practice polygamy.

<sup>606</sup> Some very concrete legal school will admit up to nine women. SILVA, A., *El Derecho Matrimonial Islámico. Breve referencia al derecho marroquí y su recepción en la legislación occidental*, Extremadura/ Madrid: Derechos Fundamentales, 2008, p. 22.

<sup>607</sup> Algerian Civil Code. Art. 8. Civil Codes Online,

<http://host.law.lsu.edu/ahclouisiane/documents/CivilCodes.pdf>, (last visited at 2013 Apr. 16).

<sup>608</sup> *Id.*, *supra* note 603, Art. 4.

<sup>609</sup> Articles from 41 to 46 detail the development of the process of such a request of authorization on the part of the husband.

<sup>610</sup> JUMAH AL-KHOLY, “Ta addud al-Zawjaat wa Hikmatuhu fil Islam”, *Journal of the Islamic University of Medina*, 2005 (46), 222-231.

The question of the meaning of a polygamous marriage seems at first sight easy enough. A marriage is polygamous – one is tempted to assume – when and only when a man has taken two or more wives without the previous dissolution, by death, divorce or otherwise, of the first union, provided that this is countenanced by the relevant law. This is apparently the conception<sup>611</sup> upon which American courts have acted in dealing with marriages of American Indians as well as of foreign nationals who had married in a community permitting polygamy. Hence, where these marriages have in fact remained monogamous, the husband not having availed himself of his right to take a second wife, they have been treated as monogamous<sup>612</sup>. The same view seems to prevail in the countries of Continental Europe, although the question has seldom been directly considered by courts and writers in those countries, except with regard to what I explained, below, regarding English practise.

The following issues must be observed when a marriage based on Islamic principles is desired<sup>613</sup>:

1. Both parties should get familiarized sincerely with each other without getting involved in immoral acts or crossing boundaries set by Islamic moral teachings. No party should attempt to deceive the other in this process;

2. A woman should be chosen on the basis of their permanent values, such as, high morals, religious devotion, and not merely on her attractiveness or other mundane aspect such as wealth. The Prophet is reported to have said that a woman is ordinarily sought as wife for her wealth, for her beauty, for the nobility of her stock, or for her religious qualities; but blessed and fortunate is he who chooses his mate for piety in preference to everything else<sup>614</sup>;

3. The woman is encouraged to judge whether the man is actually worthy of her respect, love and capable of providing her happiness in her whole life. She should consider if her marriage to the man will allow her to fulfil the duties of a wife wholeheartedly;

4. The woman has a right to demand dowry (gift) from the man that she feels comfortable with. The man should meet her demands to show his willingness to undertake

<sup>611</sup> That of actual or *de facto* polygamy.

<sup>612</sup> E. g., *Wall v. Williamson*, 8 Ala. 48 (1844); *Royal v. Cudahy Packing Co.*, 190 N.W.427 (Iowa Sup. Ct. 1922); *Proctor v. Foster*, 230 P. 753 (Okla. Sup. Ct. 1924); *Morgan v. McGhee*, 24 Tenn. 13 (1844); see the 1934 Restatement §132, Comment c; Bartholomew, *Polygamous Marriages in America* 1042-1045, 1068, 1073-1075; Leflar 538-539; Stumberg 283 n. 15; Annot. , 74 A.L.R. 1533-1540 (1931).

<sup>613</sup> ABDALATI, H., *Islam in Focus*, Indiana: American Trust Publications, 1975, p. 179.

<sup>614</sup> *Id.*, p. 115.

to responsibilities of married life and his readiness and capability to fulfil her justified needs;

5. The consent of both man and woman is a necessary condition for the marriage<sup>615</sup>;

6. The marriage ceremony should be made as publicly known as possible and should be celebrated in a joyful manner;

7. The marriage ceremony should be held before at least two adult witnesses<sup>616</sup> from the community and should be registered in official documents;

8. The maintenance of the wife and family is the husband's duty. The marriage entitles her with these rights and imposes certain obligations upon both parties. Any property which belongs to her before or during the marriage, the man has no right to the wife's property during or after the marriage.

The wife is expected to work toward the happiness and comfort of her family. The wife must be sincere toward the family and honest and loyal to her husband. She should not deliberately avoid conception against her husband's will<sup>617</sup>.

The “potential polygamy” concept is open to objections both on principle and because of its practical implications. The attribution of a polygamous “nature” to a marriage solely on the ground that polygamy is permitted by the law governing the ceremony is likely to produce hardship and/or lead to inconsistencies in combination with the principle, accepted in most countries, that capacity to marry is governed by the personal law of each party. Thus, any marriage concluded in a “polygamous form”, i.e. potentially polygamous under the law governing the ceremony, must be held invalid if the parties or one of them is a domiciliary<sup>618</sup> of a country whose law forbids polygamy<sup>619</sup>. It must be so held even if the marriage has in fact remained monogamous and even if no other form of marriage was available to the parties in the country where the ceremony took place. On the other hand, if a party who by his personal law is allowed to take a plurality of wives goes through a monogamous form of marriage, for instance in England, any subsequent marriage concluded by that party in another country where polygamy is permitted must be held invalid in the former country as violating of the “monogamous

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<sup>615</sup> For example in Civil Code of Syria, Arts. 6 and 7.

<sup>616</sup> This is the normal number of witnesses (like in Syria) but this number can change.

<sup>617</sup> ABDALATI, *supra* note 613, p. 114.

<sup>618</sup> Or a national, as the case may be.

<sup>619</sup> This is actually the prevailing opinion in English law.

nature” of the first ceremony<sup>620</sup>.

English courts, however, and in their wake other British and Commonwealth courts, have developed a different conception, according to which the decisive test is the potentially polygamous character of the marriage, in other words, whether the husband is by the relevant law entitled to take a plurality of wives<sup>621</sup>. Where such a right exists, it is considered as immaterial whether the husband has in fact exercised, or ever intended to exercise, his privilege; even though he has taken only one wife, the marriage is polygamous. Scattered examples of such an approach may also be found in Continental countries in cases where the marriage seems to have been held monogamous or polygamous, respectively, according whether the one or other character was assigned to it by the law under which it had come into existence<sup>622</sup>.

The wavering case law of the European courts foreshadows a basic uncertainty in relation to polygamous marriages. Until recent years, it could be often heard that polygamy was incompatible with the Christian roots of the European family law<sup>623</sup>. Today, after the legalization of homosexual marriages in some countries, this issue seems to weigh much less, because “the traditional Christian marriage is no more the only institution on which a family, in juridical terms, can be based”. Postmodern family law is increasingly characterized by individualism, which in turn encourages a plurality of marriage and family models.

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<sup>620</sup> This consequence seems predominantly to be accepted in English law, although there is no authority directly in point. See *Kenward v. Kenward*, [1951] P. 124, 144-145 (C.A.) (obiter), and among writers: Hartley, Bigamy 693-694; Sinclair 264-266; Clarence Smith 303-304. A similar view has been taken in the Belgian case decided by Corr. Bruxelles 12 June 1953, *Clunet* 1954, 438, and in the French decision of Cass. crim. 14 Feb. 1929, *Clunet* 1929, 712.

<sup>621</sup> Case of USA : *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130; *Sowa v. Sowa*, [1961] P. 70 (C. A.); Cheshire and North 292; Dicey and Morris 277; Hartley, Polygamy 156; Jackson 131; Morris, Recognition 298-299; cf. for a critical view, Bartholomew, Polygamous Marriages: 15 M.L.R. 35-47, 35-40 (1952); Scotland: *Muhammad v. Suna*, 1956 S.C. 366; Anton 269-270; Australia: *Khan v. Khan*, [1963] V. R. 203; Nygh 376; Canada: *Kaur v. Ginder* (1958), 13 D.L.R. (2d) 465 (B.C.S.C.), noted by Libbert: 37 Can. Bar Rev. 357-362 (1959).

<sup>622</sup> Belgian case, Corr. Bruxelles 12 June 1953, *Clunet* 1954, 438. Cf. for Danish law, Borum (-Philip), *Lovkonflikter* (Conflict of Laws) (ed. 4, Copenhagen 1957) 110; for Hungarian law, Reczei 352.

<sup>623</sup> In 1965, Lord Devlin in an argument that became famous stated that “in England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently the Christian institution of marriage has become the basis of family life and so part of the structure of our society [...]. It would be useless for [a non-Christian] to stage debate designed to prove that polygamy was theologically more correct and socially more preferable; if he wants to live in the house, he must accept it as built in the way in which it is” (The Enforcement (1965), 9, quoted by Shah P. (2005), 95).

## C. THE POSITION OF LITHUANIA WITH REGARD TO ISLAMIC MARRIAGES AND POLYGAMY

According to the 2011 census, the total number of Sunni Muslims in Lithuania was 2727 of the population<sup>624</sup>. In Lithuania, unlike many other European countries, Islam came long ago<sup>625</sup>. It was so because the medieval Grand Duchy of Lithuania, stretching from Baltic to Black seas<sup>626</sup>, included some Muslim lands in the south, inhabited by Crimean Tatars. The immigrants, the majority of whom were recently Islamized Turkic speakers (Tatars), eventually settled in the western parts of the Duchy, south and east of the capital Vilnius<sup>627</sup>. The Tatars, now referred to as Lithuanian Tatars, lost their language over time and now speak Lithuanian as natives; however, they have not lost Islam as their religion<sup>628</sup>.

Family law is an area in which the European Union since the Treaty of Amsterdam has broad competences. The Treaty of Amsterdam was agreed by Member States in 1997 and entered into force in 1999 and it gave the European Community the competence to legislate in the field of civil judicial cooperation by inserting a new provision, Article 65, into the Treaty Establishing the European Community (TEC). This competence was limited to matters having 'cross-border implications' and to measures adopted only so far as 'necessary for the proper functioning of the internal market.' Its aim was to improve the efficacy and ease with which cross-border disputes were handled.

Article 65 stated 'measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

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<sup>624</sup> Department of Statistics 2013. *Gyventojai pagal tautybę, gimtąją kalbą ir tikybą (Population by Ethnicity, Native Language, and Faith)*. Vilnius: Statistikos departamentas, <http://www.stat.gov.lt/>, (last visited June 17, 2014).

<sup>625</sup> A few Muslims by (Crimean Tatars) migrated to ethnically Lithuanian lands, now the current Republic of Lithuania, mainly under rule of Grand Duke Vytautas in 1392. The Tatars, now referred to as Lithuanian Tatars, lost their language over time and now speak Lithuanian; however, they maintained Islam as their religion. Due to the long isolation from all the greater Islamic world, the practices of the Lithuanian Tatars differ somewhat from the rest of Sunni Muslims; they are not considered a separate sect, however.

<sup>626</sup> Look at the map showing changes in the territory of Lithuania from the 13 th. Century to the present time in appendix No. 3.

<sup>627</sup> RAČIUS, E., *Islam in Lithuania: Revival at the Expense of Survival?*

[http://orient.uw.edu.pl/MSZ/teksty/16\\_racius\\_MuslimsCEE.pdf](http://orient.uw.edu.pl/MSZ/teksty/16_racius_MuslimsCEE.pdf), (last visited May 20, 2014).

<sup>628</sup> KUZNECOVIENE, J., *State and Church in Lithuania*, in ROBBERS, G., *State and Church in the European Union*, Nomos: Baden-Baden, 2007, p. 283.

(a) Improving and simplifying:

- The system for cross-border service of judicial and extra-judicial documents;
- Cooperation in the taking of evidence;
- The recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) Promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) Eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States’.

Therefore; Lithuania, as each Member State, has to a large extent kept its own legal system. Underlying the different national legal systems, there are, however, a few principles shared by all countries. Three of them prove particularly relevant in connection with the subjects considered in this paper:

1. In Lithuania, as in any other European country, it is not possible to conclude a valid polygamous marriage;
2. In Lithuania, as in any other European country, it is not possible to validly dissolve a marriage through a declaration of repudiation;
3. In Lithuania, as in every European country the rules concerning marriage celebration and dissolution are inspired by the principle of man’s and woman’s equality.

Since polygamy and repudiation are admitted by the Muslim laws (and by the laws of many states with a Muslim majority), several problems have emerged in this field, particularly as regards the guarantee of husband’s and wife’s equality. These problems have been tackled and solved mostly in case law.

#### D. THE RECOGNITION OF MARRIAGES CONCLUDED UNDER MUSLIM FAMILY LAW IN WESTERN LIBERAL COUNTRIES

Muslim communities in Europe are largely formed by immigrants who often have not yet achieved the citizenship of a European country. Therefore, it may happen that a

national of a state admitting polygamy, after having concluded in his country of origin a valid polygamous marriage, requires the European State in which resides to recognize his marriage. The international private law rules to be applied in this case differ from state to state and cannot be summarized in these pages. However, with a fair amount of approximation, and except for some particular cases<sup>629</sup>, we can say that the general rule is to recognize the effectiveness of the foreign legal institution shared by the married couple (and hence, the validity of a polygamous marriage celebrated under that law). However, on many occasions, the European courts have rejected such recognition by applying the public policy clause<sup>630</sup>, which prevents a State from considering as effective those deeds and actions that may clash with the fundamental principles of its legal system. Since polygamy clashes with some central provisions of the law on marriage in European countries, a polygamous marriage will never be recognized in Europe, even though it was concluded in a state admitting polygamy between two nationals of that state<sup>631</sup>. This attitude of rigorous rejection has been mitigated by applying the public policy principle in a softer manner, with the aim of safeguarding some limited effects of a polygamous marriage (more precisely, the effects that – in themselves – do not clash with public policy). Consequently, a child born from a polygamous marriage, can obtain, for example, the status of legitimate child, a woman who is one of the partners of a polygamous marriage has the right to be maintained by her “husband”<sup>632</sup>. In addition, she, together with the eventual other wives comes in competition to obtain the husband’s reversion of the pension<sup>633</sup> and inheritance, and is entitled to compensation for damages due to the husband in case of accidents<sup>634</sup>.

<sup>629</sup> One of them is the English law, which assumes as a basis the nation of domicile, instead of nationality. Consequently, a polygamous marriage celebrated by two foreigners in their country of origin, where polygamy is a lawful place, will not be recognized in England if one of them (or both of them) had their residences in England at the time in which the marriage was celebrated.

<sup>630</sup> About the meaning of this clause and its application to Muslim law, see LAGARDE, *supra* note 524.

<sup>631</sup> As regards Spain, see MOTILLA, A., *El Matrimonio islámico y su Eficacia en el Derecho Español*, Córdoba: U de Córdoba, 2003, p. 145. In Italy the case law in this regard is scarce but seems however oriented in the same direction: see ALUFFI BECK PECCOZ, R., *Islam in the European Union: Italy*, Leuven: Peeters, 2004, pp. 190-91. The German case law seems more inclined to recognize the validity of polygamous marriage concluded abroad, see ROHE, M., *The Legal Treatment of Muslims in Germany*, Tübingen: Mohr Siebeck, 2003, p. 94.

<sup>632</sup> As to Germany, MUCKEL, S., *Islam in the European Union: Germany*, Leuven: Peeters, 2004, p. 62; as to France, BASDEVANT GAUDEMET, B., *The Legal Treatment of Islamic Minorities in Europe: Islam in France*, Leuven: Peeters, 2004, p. 169.

<sup>633</sup> This happens in Greece: see TSISELIKIS, K., *Personal Status of Greece’s Muslims: a Legal Anachronism or an Example of Applied Multiculturalism?* Leuven: Peeters, 2004, p. 122; as regards Spain, see MOTILLA, *supra* note 621, p. 145. However, not in England: see ANSARI, H., *The Legal Status of Muslims in the U.K.*, Leuven: Peeters, 2004, pp. 271-272.

<sup>634</sup> As regards Switzerland, ALDEEB ABU-SALIEH, A., *Droit Religieux et Droit Séculier. Défi du Droit*

As a result of considerable immigration from Muslim countries and subsequent family reunifications, legal terms and concepts rooted in the Shari'a (Muslim law)<sup>635</sup> have been 'transplanted'<sup>636</sup> into Western States through one of two routes. First, through international private law rules which often directly incorporate foreign (Islamic) norms or second, through secular domestic laws.

The conception of the Islamic marriage still clashes in important aspects with the matrimonial concept contemplated in the juridical systems of the civilian law and of the common law. This is in spite of it having being mitigated or adapted in some aspects by the western right across the application and practice of the Islamic Rule in the western countries and not with standing the proper existence of Islamic marriage in countries of Islamic influence within in Europe, like the case of Bosnia<sup>637</sup> and Albania, besides the Turkish case. In relation with the matrimonial right, the reception of the Islamic law in the West has been very different<sup>638</sup>.

Nevertheless in Europe<sup>639</sup>, the inflexibility of the legal system has impeded the reception of the celebration of Islamic matrimonial rights, since in cases where formalisms required in the different legislations was not respected.

In France, a religious polygamous marriage has no enforceable legal effect if the wedding took place on French soil. Not only is polygamy an impediment to obtain French nationality<sup>640</sup>, but Art.147 of the French Civil Code specifically holds that a second marriage cannot take place unless the first one has already been dissolved<sup>641</sup>. Consequently, even between partners whose countries of origin permit polygamy, no polygamous union

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*Musulman en Suisse*, Köln: Carl Heymanns, 1999, p. 85.

<sup>635</sup> By Shari'a (Muslim law), I mean Islamic rules considered by Muslims as based upon Islamic divine revelation. In this paper, I have focused more specifically on the recognition of Islamic marriages and polygamy, the mahr (dowry) and the talaq divorce. I have excluded from the scope of this paper child custody and inheritance issues.

<sup>636</sup> The metaphor of 'legal transplant' has been used by Alan Watson when analyzing the importation of foreign legal practices in comparative law. See WATSON, A., *Legal Transplants: An Approach to Comparative Law*, Athens: University of Georgia Press, 1993, p. 21. For an opposite view on the uses and misuses of 'legal transplants', see LEGRAND, P., "The Impossibility of Legal Transplants", *Journal of European and Comparative Law*, 1997 (4), 111.

<sup>637</sup> Where polygamy is prohibited.

<sup>638</sup> SILVA, *supra* note 606, p. 31.

<sup>639</sup> With the exception of common law countries.

<sup>640</sup> C. E. 11 March 1988, Min. Aff. Soc. Et de l'emploi c Diagne, R. Tables; C.E. 28 July 1989, Keita; C.E. 15 January 1990, Cissoko.

<sup>641</sup> Code Civil, Art.147 (inséré par Loi du 17 mars 1803 promulguée le 27 mars 1803): "On ne peut contracter un second mariage avant la dissolution du premier."



can be legally recognized in France<sup>642</sup>. The second marriage will be declared absolutely null<sup>643</sup>. It is on this basis that courts have at times denied benefits to Muslim women living under a polygamous marriage in France. In 1992, for example, the Cour d'Appel de Versailles refused social security benefits to the second wife of a Muslim husband<sup>644</sup> and in 1988 the Cour d'Appel d'Aix-en-Provence similarly denied a Muslim woman her alimony on the ground that she was the second co-wife and that polygamy was considered contrary to French public order<sup>645</sup>.

However, if the Islamic ceremony was conducted in the country of citizenship of the spouses, the marriage is considered to have some legal validity under French law as long as it does not violate French public order. The Cour de Cassation<sup>646</sup> repeatedly held polygamy not to be a *prima facie* violation of French public order under those circumstances<sup>647</sup>, even though the very same union would have been declared absolutely null if contracted in France. Consequently, health insurance benefits can be paid to a woman who is registered by her husband as a dependent, regardless of whether her marriage is considered legally existing for public law purposes. If the first wife already received social security benefits, the second cannot claim them too<sup>648</sup>.

As regards Belgium I may say the legal situation is practically identical to that of France. This is the case for the strong rejection of any polygamous marriage eventually concluded on Belgian territory – such as before consular representatives of the country of origin of the partners. It is also the case for the relaxing of public policy and for benign acceptance, when the polygamous marriage itself was concluded abroad at time and under circumstances when the parties had no substantial connection to either Belgium or to a country where polygamy is forbidden (that position has been clarified in Belgian doctrine)<sup>649</sup>.

<sup>642</sup> Paris Court of Appeal, 8 December 1992, Dalloz, 1994, J. 272 and Cour de Cassation, 1ère Chambre Civile. Date decided: 15 March 1988, Gazette du Palais, 1989-1-374.

<sup>643</sup> See TGI de la Seine, 21 June 1967, in *Revue Critique de Droit International Privé*, 1968, p. 294 note Battifol, H.; Cour d'appel de Reims, 19 January 1976, in *JDI* 1976, p. 916 note Fadlallah, I.; Cour d'appel de Dijon, 1ère ch., 23 May 1995, in *JCP* 1996, IV, 176.

<sup>644</sup> Cour d'appel de Versailles, 2ème ch., 18 June 1992, inédit, in *Juris-Data*, # 044362.

<sup>645</sup> Cour d'appel d'Aix-en-Provence, 6ème ch., 19 May 1988, inédit, in *Juris-Data*, # 045979.

<sup>646</sup> Cass. Civ. 1ère ch., 19 February 1963, in *Revue Critique de Droit International Privé*, 1963, p. 559 et Cass. Civ. 3 January 1980, in *Revue Critique de Droit International Privé*, 1980, p. 331.

<sup>647</sup> The expression 'ordre public à effet atténué' has been used by the courts. E. RUDE-ANTOINE, 'Des Vies et des Familles. Les Immigrés, la Loi et la Coutume'. Paris: Odile Jacob, 1997. P. 211; E. RUDE-ANTOINE, *Le Mariage Maghrébin en France*. Paris: Karthala, 1990, pp. 138-9.

<sup>648</sup> C. Cass. Ch. Soc. 8 March 1990, *Revue Critique de Droit International Privé*, 1991, p. 694.

<sup>649</sup> ERAUW, J., *Internationaal privaatrecht (Handbook)*, Volume XVII in: *Beginselen van Privaatrecht* (W.

In Germany, the Muslim community counts more than 3 million members out of a total population of 82 million, of whom the majority (89%) are Turkish<sup>650</sup>. Islamic groups have been trying to obtain legal status for their religious communities since the early 1970s but their petitions have until now been rejected by the courts. According to the 1949 Constitution, religious denominations can acquire the status of Public Law Corporation provided that they guarantee continuity through by-laws and the number of their members<sup>651</sup>. If these requirements are not met, these religious denominations must organize themselves as mere associations under private law. In 1977, the Islamic community in Germany applied for the status of a corporation of public law<sup>652</sup> so that Islam would be publicly recognized and acknowledged as an equal religion before the law<sup>653</sup>. The District Court of Baden-Württemberg rejected the application<sup>654</sup>. Two years later a similar attempt was launched in Cologne with no success, although this time the applicants referred explicitly to Art. 4 of the German Constitution, which guarantees freedom of faith and religious practice<sup>655</sup>. For Mathias Rohe, expert on the legal treatment of Islamic minorities in Germany, the applications made by various Muslim groups to obtain such status, have been rejected on the ground that insufficient guarantees of their duration and stability were provided: “According to a decision of the conference of the state ministers of interior in 1954, the necessary stability of the community has to be proven over a period of 30 years. Up to now, the Jewish community reached this status, whereas no Muslim community succeeded in that so far. This is certainly due to the fact that there were no ideas of a long-lasting presence among larger groups of Muslims until recent times<sup>656</sup>.”

At present, no Islamic religious community has the legal status of a corporation

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Van Gerven en R. Dillemans, editors), Mechelen: Kluwer, 2009, p. 499-500.

<sup>650</sup> ROHE, *supra* note 631, p. 83.

<sup>651</sup> This status provides far-reaching rights, such as the right to levy taxes from members of the community and to organize a parish, the right to employ people under a belief-oriented labour-law, the right to nominate members to broadcast-councils, tax reductions for property placed under public property law, etc. ROHE, *supra* note 631, p. 87.

<sup>652</sup> Körperschaftsstatus.

<sup>653</sup> See VOCKING, H., *Organisations as Attempts at Integration of Muslims in Germany*, Kampen: Kok, 1993.

<sup>654</sup> JONKER, G., “What is Other about Other Religions? The Islamic Communities in Berlin between Integration and Segregation”, *Cultural Dynamics*, 2000 (3), 313.

<sup>655</sup> Art.4 (Freedom of faith, conscience, and creed) reads: Freedom of faith and conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. The undisturbed practice of religion shall be guaranteed.

<sup>656</sup> ROHE, *supra* note 631, p. 87.

under public law, unlike Christian Churches and the Jewish community; Islamic organizations are considered private associations without legal standing. As in France, stipulations of both German private international law<sup>657</sup> and bilateral agreements<sup>658</sup> provide that it is not the law of domicile but rather the law of the parties' citizenship that is applicable in matters of family law. This general principle is, of course, subject to German public policy<sup>659</sup> and to any international conventions to which Germany is a party<sup>660</sup>. These rules are of significant importance, considering that about 8.9% of the population in Germany is made up of non-citizens, including about 2 million originating from Muslim countries. The existence of these private international law rules incorporating Muslim family law at a domestic level to non-German citizens is often unknown to the Muslim community, as suggested by Christina Jones-Pauly: "Because most foreigners in Germany — and even German citizens — are not aware of the rule that their own foreign law applies to foreigners, it can come as a rude shock for some when they have marital disputes. For example, many Iranians who had fled to Germany from the Shah's regime, then from Khomeini's regime, and resided legally in Germany for as long as thirty years and if they divorce suddenly are faced in German courts, with the application of the very Islamic laws that they wished to escape. The fact that they have retained their Iranian citizenship — it has not been easy for all to obtain German citizenship — means that they are considered "guests" in the land and guests are entitled to have their own law apply in matrimonial disputes<sup>661</sup>."

In matters of family law and the law of succession<sup>662</sup>, the application of legal

<sup>657</sup> Second Chapter on International Private Law in the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art.3, EGBGB) (Prologue, the Civil Code).

<sup>658</sup> For instance, Iran and Germany have ratified a treaty that assures the application of Iranian personal status law for Iranian citizens in Germany and vice versa for German citizens residing in Iran. See Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien of 17 December 1929, Reichsgesetzblatt Jg. 1930, Teil II, p. 1002, at p. 1006. Confirmed by the Federal Republic of Germany on 15 August 1955, BGBl. Teil II, No 19, 25 August 1955, p. 829. We are unsure about its present value in relation to the Islamic Republic of Iran.

<sup>659</sup> See Art. 6 EGBGB and §138 Sec.1 BG, which reads: "A legal transaction which offends good morals is void."

<sup>660</sup> In matters of family law, Germany has also ratified the Convention of 24 October 1956 on the law applicable to maintenance obligations towards children (Hague Conference on Private International Law), the Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (Hague Conference on Private International Law) as well as the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes (Hague Conference on Private International Law).

<sup>661</sup> JONES-PAULY, C., *Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German law*, London and Cambridge, MA: Harvard University Press, 2005, p. 207.

<sup>662</sup> Art.13 EGBGB: prerequisites for and legal consequences of contracting a marriage; Art.17 EGBGB: prerequisites for and legal consequences of a divorce, legal relations between the spouses, children and other

norms in Germany is determined by the law of nationality rather than domicile. For example, the law applicable in the divorce of a Syrian couple whose marriage was contracted in Syria will be that of Syrian family law, which includes post-divorce alimony claims<sup>663</sup>. The law of domicile will only apply in cases of maintenance claims for children<sup>664</sup> or plural citizenships of the parties<sup>665</sup>. Monogamy is one of the leading German constitutional principles, as made explicit by §1306 BGB<sup>666</sup>. It is therefore legally impossible to enter into a polygamous marriage in Germany<sup>667</sup>. Similarly to France, German law is treating polygamous marriages to be potentially legally valid as long as the marriage was concluded in a country that permits polygamy and there is no open conflict with the status of a spouse<sup>668</sup>. Practically, the recognition of polygamous marriages means that Muslim women can obtain social security benefits, such as inheritance, custody rights, and child support payments<sup>669</sup>. As to the right to family reunification, the OVG Nordrhein-Westfalen<sup>670</sup> held in 1985 that a Jordanian Muslim woman was not entitled to join her husband and his first wife in Germany. In similar cases, the courts held that co-wives did not have the right to join their husbands in Germany, although once they are in the country, living there with their husband, no prosecution will be conducted as polygamy is not considered to be absolutely against German public order<sup>671</sup>.

Rules of international private law in both France and Germany may allow a “direct” application of Muslim family law for non-citizen Muslims. The *raison d’être* behind the existence of such rules is the respect for legal “difference” when people with a “cross-border identity” are involved. Such application can potentially lead to a discriminatory result for Muslim women: inheritance laws favouring males, financial support for wives limited to four months time, division of property against the woman’s

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members of the family including maintenance claims among divorced persons, guardianship and custody for minors, adoption, guardianship and welfare, and hereditary relations.

<sup>663</sup> Art. 18 (4) EGBGB.

<sup>664</sup> Art. 18 (1) EGBGB.

<sup>665</sup> Art. 14 EGBGB. In such cases, parties will be allowed to choose which law of citizenship should apply.

<sup>666</sup> See also Cf. OLG Hamburg StAZ 1988, 132f; AG Paderborn StAZ 1986, 45 (both to former rules identical to the present ones); MuenchKomm/Coester 3. edn. 1998 Art. 13 EGBGB.

<sup>667</sup> ROHE, *supra* note 631, pp. 46-59.

<sup>668</sup> See LG München, 235 Js 54017/95, 26 April 1996; LG Frankfurt A.m., fAMrz 1976, P. 217; LG Osnabrueck, NJW-RR, 1998, p. 582; AG Bremen, StAZ 1991, p. 232, 233; VGH Kassel, NVwZ-RR, 1999, pp. 274-275.

<sup>669</sup> Syrian Paternity Case. VersR 1997, p. 863. OLG Saarbrücken - 5 U 800: p. 95-82. Date decided: 18 December 1996.

<sup>670</sup> Jordanian Polygamy Case, 17 A 42/83, 7 March 1985.

<sup>671</sup> ROHE, *supra* note 631, p. 83.

interest and child custody given to fathers depending on the age of the child. The only way for courts to protect the equality rights of Muslim women in cases where the application of Muslim family law would be discriminatory is to use the principle of “public policy” to prevent such particular applications.

Secular law in most "Western" countries with large Jewish and Christian populations does not recognise polygamous marriages. However, few such countries have any laws against living a polygamous lifestyle: they simply refuse to give it any official recognition. Parts of the United States, however, criminalise even the polygamous lifestyle, which is unusual; these laws originated as anti-Mormon legislation, although they are rarely enforced.

## V. OTHER RELIGIOUS MARRIAGES

### A. INTRODUCTORY ASPECTS OF SUBSTANTIVE RULES

Civil marriage and religious marriage are different institutions, but are often confused with each other because states allow the religious ceremony to double as the state ceremony. There are different marriage laws in all the states and different definitions of marriage in every religious tradition.

Protestant denominations see the primary purpose of marriage to be to glorify God by demonstrating his love to the world<sup>672</sup>. Other purposes of marriage include intimate companionship, rearing children and mutual support for both husband and wife to fulfill their life callings. Protestants generally approve of birth control and consider marital sexual pleasure to be a gift of God.

Under Evangelical Lutheran religion marriage is the relationship between a man and a woman. First and foremost, Luther defines marriage as a vocation, indeed the chief form of discipleship for Christians. Here one finds an interesting intersection of the two reigns of God. Luther rejects the sacramental status of marriage because, unlike baptism and Eucharist, it does not convey the forgiveness of sins in Christ Jesus. In fact, it is not in any way a means of establishing the reign of Christ through the Gospel. Marriage has its

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<sup>672</sup> Praise, honor.

roots before the fall, in the pairing of Adam and Eve. It is part of the ordering of creation and applies to all people, not exclusively Christians. For this reason Luther is adamant that legislation around marital and family matters rightly belongs to the civil authority, not the Church. He gives strength to his case by denouncing in detail the multiple ecclesiastical laws that affected couples adversely<sup>673</sup>.

In Judaism, marriage is viewed as a contractual bond commanded by God in which a man and a woman come together to create a relationship in which God is directly involved. Though procreation is not the sole purpose, a Jewish marriage is also expected to fulfill the commandment to have children<sup>674</sup>. The main focus centers on the relationship between the husband and wife. Kabbalistically, marriage is understood to mean that the husband and wife are merging together into a single soul. This is why a man is considered "incomplete" if he is not married, as his soul is only one part of a larger whole that remains to be unified<sup>675</sup>.

In Jewish law<sup>676</sup>, a view of marriage as a contract prevails in both the celebration and the termination of marriage, even though the presence of some religious aspects cannot be denied. In this contractual framework neither a license nor permission is required to form or dissolve a marriage and the role of the State or religious authority is merely a declaratory one.

Marriage is considered as a contract founded on the free agreement of spouses, even though consent is expressed during a formal public ceremony, with some ritual/religious aspects. However, some limits to marriage are given by religious law. Marriage is invalid when the consent is founded on deception or threats, or is in any other way imperfect<sup>677</sup>.

Even though marriage is based on the free consent of both spouses<sup>678</sup>, the patriarchal view of family and its consequent favouring of the male appears:

1. In religious-legislative promotion of marriage between underage people;
2. In some aspects of a woman's subjection regarding her property (a woman's

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<sup>673</sup> STROHL, J., "On Marriage and Family", *Journal of Lutheran Ethics (JLE)*, 2009 (9), 2.

<sup>674</sup> (Genesis 1:28).

<sup>675</sup> *Why Marry*, *supra* note 67.

<sup>676</sup> NOGOSIAN, S., *Judaism, the Way of Holiness*, Crucible: Walker Publisher, 1986, p. 182.

<sup>677</sup> MADERA, A., "Juridical Bonds of Marriage for Jewish and Islamic Women", *Ecclesiastical Law Society*, 2009 (11), 51-64.

<sup>678</sup> RABELLO, A., *Il Matrimonio nel Diritto Ebraico, Canonico, Islamico: un Commento alle Fonti*, Torino: Giappichelli, 2006, p. 10.

wealth is subject to male management, while her maintenance right is in relation to her earnings);

3. In some duties coming from the marriage bond (differences of effects as the result of unfaithfulness) and from different importance given to the consent of spouses for marriage termination.

Hinduism sees marriage as a sacred duty that entails both religious and social obligations. Old Hindu literature in Sanskrit gives many different types of marriages and their categorization ranging from "Gandharva Vivaha" (instant marriage by mutual consent of participants only, without any need for even a single third person as witness) to normal (present day) marriages, to "Rakshasa Vivaha"<sup>679</sup>. Under Hindu law, marriage is viewed as a sacrament, in contrast to Muslim law, under which marriage is regarded as a contract. The Special Marriage Act authorizes some interreligious civil marriages. The 1937 Arya Marriage Validation Act recognizes the legality of intercaste marriages. The 1955 Hindu Marriage Act, which applies to any person in India who is not a Muslim, Christian, Parsi, or Jew, establishes the legal parameters of Hindu marriage, and prohibits bigamy as well as certain degrees of consanguinity<sup>680</sup>.

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<sup>679</sup> "Demoniac" marriage, performed by abduction of one participant by the other participant, usually, but not always, with the help of other persons.

<sup>680</sup> STARK, B., *International Family Law*, London: Ashgate Publishing Company, 2005, p. 114.

## B. THE POSITION OF LITHUANIA WITH REGARD TO OTHER RELIGIOUS MARRIAGES

In Lithuania the State recognizes Churches and religious organisations provided they have a basis in society and their teaching and rituals do not contradict morality or the law. The Churches and religious organisations, which are recognised by the State, have the right of legal person.

Under Article 5 of Lithuanian law of Religious communities and associations the State recognises nine traditional religious communities. Traditional Religious Communities and Associations of Lithuania and associations existing in Lithuania, which comprise a part of the historical, spiritual and social heritage of Lithuania are: Roman Catholic, Greek Catholic, Evangelical Lutheran, Evangelical Reformed, Russian Orthodox, Old Believer, Judaist<sup>681</sup>, Sunni Muslim and Karaite.

Marriages concluded under procedures of those religious should be recognized by the State. There are some limitations in this recognition as under Article 3.24, 2 part the formation of a marriage in accordance with the procedures established by the Church (confessions) shall entail the same legal consequences<sup>682</sup> as those entailed by the formation of a marriage in the Civil Registry Office provided that:

- 1) the conditions laid down in Articles 3.12 to 3.17<sup>683</sup> hereof have been satisfied;
- 2) the marriage has been formed according to the procedures established by the canons of a religious organization registered in and recognized by the Republic of Lithuania;
- 3) the formation of a marriage in the procedure established by the Church (confessions) has been recorded at the Civil Registry Office in the procedure provided.

If religious marriage is concluded outside Lithuania and provides no civil status in the local law, Lithuania will not recognize such marriage as valid. As mentioned above,

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<sup>681</sup> Lithuanian Jews are Ashkenazi and Sephardic Jews with roots in the Grand Duchy of Lithuania. Lithuania was historically home to a large and influential Jewish community that was almost entirely eliminated during the Holocaust. Before World War II, there were over 110 synagogues and 10 yeshivas in Vilnius. Before World War II, the Lithuanian Jewish (Litvaks) population was 160 000, approximately 7% of the total population. Nowadays about 4 000 Jews live in Lithuania (for further details, see Katz 2004; Katz 2008; Levin, Teller 2001).

<sup>682</sup> As were mentioned in previous pages.

<sup>683</sup> Prohibiting marriage of persons of the same gender, voluntary nature of marriage, legal age of consent to marriage, active capacity, prohibition to violate, the principle of monogamy, prohibition to contract marriage between close relatives.



under Article 126 of Lithuanian CC marriage shall be recognized valid if the procedure of its contracting is in compliance with the requirements of the law of the state of domicile of either of the spouses or the law of the state of citizenship of either of them at the moment of solemnization of the marriage.

## ***Chapter 2***

### ***Recognition of the nullity of marriage***

#### **I. THE GROUNDS AND PROCEDURES FOR DECLARING MARRIAGE NULL AND VOID**

##### **A. ABOUT ANNULMENT OF MARRIAGE IN GENERAL**

In strict legal terminology, annulment<sup>684</sup> refers only to making a voidable marriage null; if the marriage is void *ab initio*, then it is automatically null, although a legal declaration of nullity is required to establish this. Annulment is a legal procedure for declaring a marriage null and void. With the exception of bigamy and not meeting the minimum age requirement for marriage, it is rarely granted. A marriage can be declared null and void if certain legal requirements were not met at the time of the marriage<sup>685</sup>. If these legal requirements were not met then the marriage is considered to have never existed in the view of the law. This process is called annulment. It is very different from divorce in that, while a divorce dissolves a marriage that has existed, a marriage that is annulled never existed at all. Thus unlike divorce, it is retroactive: an annulled marriage is considered never to have existed<sup>686</sup>.

An annulment is a legal procedure which cancels a marriage between a man and a woman. Annuling a marriage is as though it is completely erased – legally, it declares that the marriage never technically existed and was never valid. Annulment of marriage is very important in the scheme of matrimonial laws as there is no point in carrying the burden of divorce in cases where marriage has been solemnized on the basis of fraud or where the marriage is solemnized despite the fact that the responding spouse was already married.

The concept of nullity depends on an examination of the situation at the very moment of the ceremony or alleged ceremony of marriage. True, no doubt, in questions of

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<sup>684</sup> Annulment is the dissolution of a marriage. The word comes from the Latin *annullare* meaning "to make to nothing. When annulled, a marriage is declared to have never been valid.

<sup>685</sup> SHUBHNEET, K., *Nullification of Marriage - an Annulled Marriage*, 2008, <http://www.legalserviceindia.com/article/1152-Nullification-of-Marriage---An-Annulled-Marriage.html>, (last visited Nov. 20, 2013).

<sup>686</sup> JENKS, R., *Divorce, Annulments, and the Catholic Church: Healing or Hurtful?* New York: Haworth Press, 2002, p. 37.

nullity, supervening events may sometimes throw light on the original situation. But they must still relate back.

The grounds and procedures for declaring marriage null and void in Lithuania are provided in Article 3. 37 of the Civil Code. Under this article the grounds for declaring marriage null and void are the following:

1. Marriage may be declared null and void if the conditions for the conclusion of a valid marriage set out in Articles 3.12 to 3.17<sup>687</sup> hereof have been violated as well as on the grounds provided for in Article 3.21 paragraph 3<sup>688</sup>, Articles 3.39<sup>689</sup> and 3.40<sup>690</sup> hereof;
2. A marriage may be annulled only by court procedures;
3. A marriage that the court declares to be null and void shall be void *ab initio*;
4. Having pronounced a marriage null and void, the court must send a copy of its judgement to the Civil Registry Office where the marriage was registered, within three business days of the effective date of the court decision.

Legal effects of a marriage being declared null and void are provided in the Article 3. 45 of the Civil Code. Any children born of a marriage subsequently decreed void by the court shall be treated as born within marriage. Where both the spouses were in good faith, i.e. did not and could not know about the impediments to their marriage, the legal consequences of their marriage, although it has been declared null and void, shall be the same as those of a valid marriage except for the right of succession. Where only one of the parties was in good faith, the party in good faith shall be entitled to all the rights a spouse is entitled to by virtue of a valid marriage. With a null and void marriage where both the parties were in bad faith, they lose all the rights and duties spouses have by virtue of a valid marriage. Each of them shall have a right to recover their own property<sup>691</sup>.

The application for marriage annulment shall be represented to the court of the district where the defendant or one of defendants resides. The requirements for the application are provided in the civil procedure code<sup>692</sup>.

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<sup>687</sup> In those articles are pointed the requirements for valid marriage, which were discussed in the previous chapters.

<sup>688</sup> Failure of one of the parties to an intended marriage to inform the other party that he or she is suffering from a venereal disease or AIDS shall provide a cause for rendering the marriage null and void.

<sup>689</sup> A marriage formed fictitiously without the true intention of creating a legal family relationship may be declared null and void on the petition of either spouse or a public prosecutor.

<sup>690</sup> This article declaring a marriage null and void due to the lack of free will.

<sup>691</sup> European Judicial Network in civil and commercial matters. Divorce-Lithuania. Divorce-Lithuania. (last visited October 23, 2013).

<sup>692</sup> Code of Civil Procedure of the Republic of Lithuania Vilnius: Lithuanian Republic Ministry of Justice,

The procedures for declaring marriage null and void in Member States<sup>693</sup> are provided in Brussels II Regulation. This regulation was replaced by Regulation 2201/2003 (the „Brussels II *bis*“), for cases introduced on or after 1 March 2005. Under Brussels II *bis* Regulation recognition of divorce and marriage annulment is without special procedures, there is no review of basis of jurisdiction and for review of applicable law and no exequatur proceedings are required<sup>694</sup>.

Under Brussels II *bis* Regulation once the annulment of marriage has been declined in one Member State, there can only be a divorce in all Member States and no second proceeding for marriage annulment<sup>695</sup>.

The procedure for recognition of decisions of foreign court (meaning of courts in EU Member states and other countries) is regulated under the civil procedure code. The application for recognition of foreign court decision shall be presented to the Appeal court of Lithuania. A party seeking recognition shall produce the judgement, its translation into Lithuanian language, confirmation that the decision has come into force and if the foreign decision was taken in absentia evidentiary material that the party in default was duly informed about the place and time of the hearing of the case.

A decree of nullity pronounced by a court of competent jurisdiction is a judgment *in rem*<sup>696</sup> determining status, and thus demands recognition by all other courts wherever situated<sup>697</sup>. But the effect of the decree is not inevitably the same in the country in which it is recognized as it is in the country in which it was pronounced. Different legal systems may assign different consequences to the same set of circumstances. Where such differences exist on the recognition of a foreign decree, the question arises as to which consequences are to follow. I will hereafter look at a few national approaches as examples.

The effects of a foreign nullity decree which is recognised in Ireland is not clear, in the absence of case law on the subject. A major question of principle arises as to how the Irish courts would deal with a situation where the effects of the foreign decree of

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2003, Art. 382.

<sup>693</sup> The Brussels II *bis* Regulation applies as of 1 March 2005 in all Member States of the European Union, with the exception of Denmark.

<sup>694</sup> Regulation (EC) No 2201/2003.

<sup>695</sup> MAGNUS, U. and MANKOWSKI, P., *Brussels IIbis Regulation: European Commentaries on Private International European law*, Munich: European law publishers, 2012.

<sup>696</sup> *In rem* (Latin power about or against "the thing") is a legal term describing the power a court may exercise over property (either real or personal) or a "status" against a person over whom the court does not have "in personam jurisdiction". Jurisdiction *in rem* assumes the property or status is the primary object of the action, rather than personal liabilities not necessarily associated with the property (quasi *in rem* jurisdiction).

<sup>697</sup> *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H. L.) 80; [1927] A.C. 641.

nullity under the law of the foreign country differ from those under Irish law. This problem would arise where under Irish law the marriage was void but under the law of the foreign court was voidable, or where under Irish law the marriage was voidable and under the law of the foreign country it was void. The English and Scottish law Commissions have observed that “[t]he cases give no firm guidance on this problem, although a dictum of Viscount Haldane in the *Von Lorang* case might be taken to indicate that the foreign effect of a foreign decree should be recognised<sup>698</sup>”.

In Belgium the absolute grounds for annulment are: failure to have reached puberty, incest, bigamy, and the illicitness (e.g. a marriage celebrated (only) by a priest) and incompetence of the registrar. The minimum age for entering into marriage has been fixed at 18, both for men and for women. This requirement originates from the idea that the spouses must have reached a certain level of maturity. There is a ban on marriage between direct ascendants and descendants (Section 161 of the Civil Code). This rule applies both to blood relatives and to adoptive family (Section 353 -13 and 356-1 of the Civil Code). The ban is also valid as regard to collaterals. Marriage is forbidden between brother and sister (Section 162 of the Civil Code). This ban extends to adoptive children of the same parents (Section 353-13 of the Civil Code). Marriage is forbidden between uncle and niece and between aunt and nephew (Section 163 of the Civil Code) but this ban may be lifted for serious grounds (Section 164 of the Civil Code). There are grounds for annulment in the event of failure to comply with all these bans (Section 184 of the Civil Code). As marriage is prohibited to any person who is already married, it is the second marriage which must be pronounced null and void (Section 188 of the Civil Code). Publicizing the marriage being an essential condition for the validity of the act, a marriage by proxy, celebrated outside the presence of spouses or witnesses, is invalid. The presence of the registrar being vital, so that the exchange of the parties’ consents is duly instanced, the absence of this municipal representative constitutes a ground for nullity of the marriage<sup>699</sup>.

The only relative ground for nullity of marriage is error concerning the person of the spouse (art. 180 of the Belgian Civil Code). In this case, marriage may only be disputed by the spouse led into error, and this, within a certain deadline (art. 181 of the Belgian Civil Code).

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<sup>698</sup> Administrator of Austrian Property v. Von Lorang, *supra* note 686, p. 267.

<sup>699</sup> European Judicial Network in civil and commercial matters. Divorce – Belgium, [http://ec.europa.eu/civiljustice/divorce/divorce\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_bel_en.htm), (last visited May 1, 2013).

Annulment has the effect of cancelling the marriage, both for the future and for the past. Nullity is effective, retroactively, on the day of the marriage. All the effects of the marriage disappear. The rights created by the marriage are abolished retroactively. The marriage is deemed never to have existed. Matrimonial agreements cannot have any effect.

Each spouse loses the rights he has had on his spouse's estate. The gifts made with a view to the marriage lose their validity. The maintenance obligation disappears for the future but does not give rise to the return of maintenance given in the past. When the spouses are in good faith, that is, when they have been unaware of the existence of a ground for nullity, the court may decide that the marriage is declared null and void only for the future, whilst it maintains its effects for the past. This effect is called the recognition of a „putative“ marriage. When one of the spouses is acting in good faith, the marriage produces its effects only with regard to this spouse. The child born during the marriage or within 300 days of the annulment keeps his mother's husband as his father (Section 315 of the Civil Code). In accordance with Section 202 of the Civil Code, marriage also produces its effects in favour of children, even if no spouse has acted in good faith<sup>700</sup>.

There are no rules governing marriage annulment in Swedish law. A marriage can be dissolved in two ways: if one of the spouses dies or if a court makes a decree for divorce<sup>701</sup>.

There are no provisions on marriage annulment in Finnish legislation. The public prosecutor must, however, bring a case for the spouses to be granted a divorce immediately should the spouses be close relatives or if one of the spouses was already legally married at the time of entering into marriage<sup>702</sup>.

In Slovakia, besides its dissolution by divorce, marriage can also be declared invalid by a judicial decision. Such marriage is deemed not to have been concluded from the beginning (*matrimonium nullum*). In addition, the court may declare that the marriage has never come into existence (*non matrimonium*)<sup>703</sup>.

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<sup>700</sup> European Judicial Network in civil and commercial matters, *supra* note 699.

<sup>701</sup> European Judicial Network in civil and commercial matters. Divorce – Sweden, [http://ec.europa.eu/civiljustice/divorce/divorce\\_swe\\_en.htm#7](http://ec.europa.eu/civiljustice/divorce/divorce_swe_en.htm#7), (last visited May 1, 2013).

<sup>702</sup> European Judicial Network in civil and commercial matters, Divorce – Finland, [http://ec.europa.eu/civiljustice/divorce/divorce\\_fin\\_en.htm#7](http://ec.europa.eu/civiljustice/divorce/divorce_fin_en.htm#7), (last visited May 15, 2013).

<sup>703</sup> European Judicial Network in civil and commercial matters. Divorce – Slovakia, [http://ec.europa.eu/civiljustice/divorce/divorce\\_svk\\_en.htm#7](http://ec.europa.eu/civiljustice/divorce/divorce_svk_en.htm#7), (last visited May 15, 2013).

## B. NULLITY OF A FICTITIOUS ('SHAM') MARRIAGE

Some marriages are a strategy to circumvent the rules that various countries apply to foreign nationals. The primary intention involved in those cases is not to found a family but rather, in most cases, to use the marriage as a means of obtaining a residence permit or nationality. Such was the situation in the case of a woman of French nationality who was married in Turkey to a Turkish national. The French public prosecution service applied to the courts for the marriage to be annulled on the grounds that the husband's only motive in contracting it had been to gain entry to France. On 25 October 2001 the Court of First Instance in Chaumont declared the marriage void, and that decision was upheld by the Court of Appeal (First Civil Chamber) in Dijon on 22 January 2004. The facts that the couple did not have a shared language and that the husband had had the banns published on the day after the woman arrived in Turkey, as well as the 20-year age gap between the spouses, were sufficient proof that matrimony was not the husband's intent<sup>704</sup>.

Similar considerations applied in another case where a husband had organized a wedding taking advantage of his wife's psychological weakness and her desire to be married. The woman applied to have the marriage annulled, supplying evidence that the husband's sole motive had been to obtain French residence papers. On 10 January 2003 the Court of First Instance in Bergerac declared the marriage void and the decision was confirmed by the Court of Appeal (Sixth Chamber) in Bordeaux on 17 March 2004<sup>705</sup>. The judges stated that the husband's behavior – the fact that he remained in Morocco after the honeymoon while the wife returned to France, and that he then came to France to move in with his sister – indicated an absence of genuine consent to marriage. They added that the wife's withdrawal of her application when the husband did finally move in with her merely indicated that she loved him and was prepared to forgive him. The fact that he had left again some six weeks later demonstrated that the union was false. The judges used the term "pretence", with application solely to the husband.

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<sup>704</sup> French public prosecution service v. woman of French nationality, Court of Appeal (First Civil Chamber) Dijon on 22 January 2004.

<sup>705</sup> *Juris-Data*, No. 2004-238056.

The Civil Registry offices of Germany have the right to refuse to conduct the marriage ceremony if they suspect a ‘fictitious marriage’<sup>706</sup>. In this sense, the authorities or, more precisely, individual officials, regulate immigration to and integration in Germany. Anderson<sup>707</sup> talks about ‘the legitimate immigration regulation within the scope of marriage’.

The focus of the immigration office is on a familial and marital relationship, which implies that controls are also possible after the wedding. In Germany, as in other European countries, marriage for the purpose of obtaining a residence permit is viewed as deception and can be prosecuted<sup>708</sup>. According to § 92a of the Foreigner law, the foreigner can lose the residence permit and the German person involved can be penalized if it is proven that the purpose of the marriage was to obtain a residence permit in Germany. In addition, the penalty for the German person is even higher when he or she accepted money in exchange for marrying the foreigner.

Under the Lithuanian civil law, marriage has a specific feature and purpose, i.e. to create a family. In absence of such purpose, i.e. if the marriage is concluded without the intention to create a family, the marriage may be declared null and void. This requirement is stated in Article 3.39 of the CC: “A marriage formed fictitiously without the true intention of creating a legal family relationship may be declared null and void on the petition of either spouse or a public prosecutor”. The same requirement exists under church law<sup>709</sup>.

According to the Lithuanian civil law, absence of purpose to create a family results in invalid marriage. However, this condition usually depends on the will and inner self-determination of the parties to be married; therefore, it is hard to prove the existence of this provision before marriage. Usually, such fictitious<sup>710</sup> marriage is concluded following

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<sup>706</sup> The so-called ‘fictitious marriage’ also referred to as ‘marriage of convenience’ (‘Scheinehe’ or ‘Aufenthaltsehe’) is defined by the European Union as solely aiming at circumventing the rules on the entry and residency of third country nationals and on obtaining a residence permit.

<sup>707</sup> ANDERSON, P., *Dass Sie uns nicht vergessen...Menschen in der Illegalität in München.* Eine empirische Studie im Auftrag der Landeshauptstadt, München: Stelle für interkulturelle Zusammenarbeit, 2003, p. 93.

<sup>708</sup> BECK-GERNSHEIM, E., *Transnational Heiratsmuster und transnationale Heiratsstrategien. Ein Erklärungsansatz zur Partnerwahl von Migranten*, Bonn: Soziale Welt, 2006, p. 120.

<sup>709</sup> According to the § 1, Can 1061 valid marriage between baptised persons is said to be merely ratified, if it is not consummated; ratified and consummated, if the spouses have in a human manner engaged together in a conjugal act in itself apt for the generation of offspring. To this act marriage is by its nature ordered and by it the spouses become one flesh.

<sup>710</sup> Here follows a whole story of prevention and of special difficulties in controlling fictitious marriages when they were concluded abroad – under the rules for recognition and legalization documents for entering



a material interest. Another aspect of this article is the possible misuse by spouses, where they intend to declare marriage as null by saying their marriage was fictitious.

### C. DECLARING A MARRIAGE NULL AND VOID DUE TO THE LACK OF FREE WILL

Under Article 3.40 of Lithuanian CC, a marriage may be declared null and void if a spouse can prove that at the time of marriage, he or she was incapable of understanding the true meaning of his or her actions or was out of their free will. Nullity of marriage may be sought by a spouse if he or she entered into the marriage under threat, duress or fraud.

A spouse who agreed to the terms of marriage based on a grave mistake may seek the nullity of the marriage. The mistake is presumed to be grave if it is a mistake about the circumstances related to the other party, the knowledge of which would have been a sufficient reason for the party not to enter into the marriage. The mistake is presumed to be essential if it is about:

- 1) The health condition or the sexual abnormality of a party which makes the usual family life impossible;
- 2) The grave crime committed by the other party<sup>711</sup>.

In order for a marriage to be validly engaged, both parties must give their ‘full, free and informed consent’. It is not sufficient that the parties have by their words in the nuptial ceremony verbally expressed a wish to be married. The courts have long recognized that there may be the evidence of consent where in fact no real consent has been given, as where a party enters into marriage under duress or where the marriage is the result of a mistake or misrepresentation. The circumstances in which the court will grant relief, however, have dramatically evolved over the past thirty years.

Prior to 1970, it was possible to say with some confidence that the courts would only grant relief in the case of lack of consent in a narrowly defined set of circumstances. The traditional grounds of relief, duress, mistake and misrepresentation were restrictively defined so as to deny relief in all but the most pressing and obvious cases.

It appears that even emotional pressure was sufficient to undermine an apparently

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into the country or the EU.

<sup>711</sup> Lithuanian Civil Code. Art. 3.40, § 3.

free consent. In *S. v. O' S.*<sup>712</sup>, Finlay J. granted an annulment in the case of a petitioner who married due to the respondent's claims that without her constant attention and presence he would die. In such circumstances the petitioner was found to be in a state of "emotional bondage" from which she could not escape. In his judgment Finlay J. noted that "the freedom of will necessary to enter into a valid contract of marriage is one particularly associated with emotion and that a person in the emotional bondage of another person couldn't consciously have the freedom of will".

In *O' R v. B.*<sup>713</sup> a petitioner entered into... marriage under the duress displayed respondent's distress of the whenever he tried to break off the engagement"<sup>714</sup>. A decree of nullity was granted.

In *N (orse K) v K*<sup>715</sup>, the 19-year-old petitioner had become pregnant after a short, casual relationship and was pressured by her parents into marrying. She later sought a decree of nullity on the grounds of duress. The High Court refused a decree, on the grounds that the parties had intended to marry anyway, but the Supreme Court allowed the appeal. It held that duress was not restricted to threats of physical harm or other harmful consequences, and the court must consider whether the parties' consent was real or apparent. If the decision to marry was "caused by external pressure or influence, whether falsely or honestly applied, to such an extent as to lose the character of a fully free act of that person's will, no valid marriage had occurred".

Decrees have been granted in circumstances where parties have mistakenly believed the ceremony to be something rather than a ceremony of marriage. In *Valier v. Valier*<sup>716</sup>, for instance, an Italian with a limited command of English went through a civil ceremony of marriage in England. The marriage was deemed null and void on the ground that the latter had believed it to be a ceremony of betrothal only and not of marriage *per se*<sup>717</sup>.

The second situation in which the courts traditionally granted relief was, there existed an error as to the identity of a spouse. The line of cases upon which this principle was based proceed on foot of an exceptionally fine distinction between the identity of a

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<sup>712</sup> Irish case. High Court. Finlay J., November 10. 1978.

<sup>713</sup> Irish case. [1995] 2 I. L. R. M. 57.

<sup>714</sup> *Id.*

<sup>715</sup> Irish case. [1986] ILRM 75.

<sup>716</sup> English case. *Valier v. Valier*. 1925. 133. L.T. 830.

<sup>717</sup> A similar belief was entertained in English case: *Ford v. Stier*, 1896.

person (who he or she is) and his or her characteristics (what attributes he or she possesses). In the words a Canadian judge of the late nineteenth century “the maxim Caveat Emptor (‘let the buyer beware’) [applies] as brutally and necessarily to a case of marriage as it [does] to the purchase of a rood of land or a horse”<sup>718</sup>.

In summary, Lithuanian law regards the motive to marry as irrelevant. Provided that the parties exchange a full, free and informed consent to marry their motive in doing so is of no consequence to the question of consent unless as explained above, fraud was involved.

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<sup>718</sup> Canadian case. Falconbridge J. In *Brennan v. Brennan*. 19 Ont. Rep. 327, 1889.

## II CATHOLIC CHURCH ANNULMENTS OF MARRIAGE AND ITS RECOGNITION PROBLEMS IN CIVIL LAW

### A. INTRODUCTION TO CHURCH ANNULMENTS

Marriage, therefore, in conformity with a conviction rooted in the civilizations of all the ages, is a ~~private~~ public union. Hence, those who contract it cannot declare its nullity themselves. What is necessary instead is a true ascertainment of the objective truth concerning the validity or invalidity of the union. This commitment to seeking the truth must satisfy two fundamental conditions: it must permit the defence and discussion of the arguments both for and against nullity, as well as the gathering of evidence that proves the one or the other. It must also assign the task of judgment to an impartial third party. These two prerequisites are essential to judicial proceedings, a juridic institution which, moreover, the Church herself has largely contributed to shaping throughout history. In the case of the processes of matrimonial nullity, a specific role has been introduced that enables those characteristics to be maintained when both parties are in agreement in requesting the declaration of nullity: in each case it is the task of the defender of the bond to contribute all that can be deduced in favour of the existing validity of the marital bond<sup>719</sup>.

Formatuotas: Perbraukimas

Marriages annulled under the Catholic Church are considered as null and void *ab initio*, meaning that the marriage was invalid from the beginning. A common misconception is that if a marriage is annulled, the Catholic Church is saying the marriage never took place. The parties to the marriage know that the marriage took place. The Church is saying that the marriage was not valid; the valid marriage is what did not take place<sup>720</sup>.

Causes of the nullity of marriage can be decided only through the sentence of a competent canonical tribunal. However, the Apostolic Signatura enjoys the faculty of deciding by decree cases of the nullity of marriage in which the nullity appears evident; but if they require a more detailed study or investigation the Signatura is to remit them to a

<sup>719</sup> „*Dignitas Connubii*”, On The Norms To Be Observed At Ecclesiastical Tribunals In Matrimonial Proceedings: [http://www.vatican.va/roman\\_curia/pontifical\\_councils/intrptxt/documents/rc\\_pc\\_intrptxt\\_doc\\_20050208\\_present-dignitas-connubii\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050208_present-dignitas-connubii_en.html), (last visited December 19, 2013).

<sup>720</sup> ZWACK, J., *Annulment: Your chance to remarry within the Catholic Church*, London: Harper Collins Publishers, 1983, pp. 5-7.

competent tribunal or another tribunal, if need be, which is to handle the cause according to the ordinary procedure of the law<sup>721</sup>.

Having a civil annulment does not automatically lead to a church annulment. In the eyes of the Church, the only way to terminate a marriage<sup>722</sup> is by seeking a petition of nullity in a canon law church court, which declares the marriage “null”. Technically the Church does not dissolve the marriage. Rather it makes a finding that a valid sacrament marriage was not created or entered into on the wedding day. This will allow a Catholic to remarry in the church, to receive communion and to participate in all the other sacraments. Full participation is denied a Catholic who remarries without obtaining a church annulment – even if he or she obtained a civil annulment<sup>723</sup>.

Causes for the declaration of the nullity of marriage cannot be handled through the oral process (cf. can. 1690)<sup>724</sup>.

This Instruction is concerned only with the process for the declaration of the nullity of marriage, and not with the processes for obtaining the dissolution of the marriage bond (cf. cann. 1400, § 1, n. 1; 1697-1706)<sup>725</sup>.

For Christians in general, marriage – from a religious standpoint – cannot be broken by the single will of either spouse or by their combined wills (mutual consent), since it is a sacrament. For those interested in keeping communion with their own Church, its consent must be sought, according to certain conditions. This consent becomes more critical if a divorcee (following a ruling by a civil personal status court) wishes to remarry within his or her church. If that Church deems a divorce was not according to its teaching, remarriage will not be authorized. Thus, the individual is left with the option of remarrying in another church (usually Protestant, which is more lenient in that regard), after “converting” to the new denomination or of just remarrying in a civil law marriage. Generally speaking, according to Church doctrine, a marriage can be terminated through “annulment” or “dissolution”<sup>726</sup>.

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<sup>721</sup> Instruction *Dignitas Connubii* from the pontifical council for legal texts, 2005. Art. 5 – § 1- § 2, [http://www.vatican.va/roman\\_curia/pontifical\\_councils/intrptxt/documents/rc\\_pc\\_intrptxt\\_doc\\_20050125\\_dignitas-connubii\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html), (last visited December 18, 2013).

<sup>722</sup> Other than by the death of one of the parties.

<sup>723</sup> STATSKY, W., *Family law th Essentials*, New York: Thomson Delmar Learning, 2004, p. 78.

<sup>724</sup> Instruction *Dignitas Connubii* from the pontifical council for legal texts, *supra* note 690, Art. 6 – § 1.

<sup>725</sup> *Id.*, Art. 7 – § 1.

<sup>726</sup> THOMAS, I., “Divorce of Christians between the '38 Ordinance, the unified law and civil marriage” (in Arabic), *Alhbar Saarah [Good News]* (magazine of the Evangelical Church), March 2006, <http://www.akhbarsarra.com/news.php?Id=1051>, (last visited May 15, 2013).

In the case of the Roman Catholic Church, annulment does not bear the same meaning as divorce. According to Catholic Church teachings, all marriages are permanent and therefore divorce is not an option. A "Declaration of Nullity" is not dissolution of a marriage, but rather the determination that the marriage was contrary in some way to Divine law as understood by the Catholic Church. An annulment affirms the Scriptural basis of divorce and at the same time affirms that in a true marriage, a man and a woman become *one flesh* before the eyes of God.

So questions may arise as to whether that person was able to contract a valid marriage. For this reason (or for other reasons that render the marriage null and void) the Church, after an examination of the situation by the competent ecclesiastical tribunal, can declare the nullity of a marriage, i.e., that the marriage never existed. In this case the contracting parties are free to marry, provided the natural obligations of a previous union are discharged.

The main ground for a church annulment is defective consent, usually due to "lack of due discretion" or "lack of due competence". A primary focus of the church court is whether the parties entered the marriage through a free act of the will with the intention to accept the essential elements of marriage: permanence, fidelity, and conjugal love that is open to children. Among the factors that can interfere with this intention are duress, fraud, conditions to one's consent, and psychological problems such as mental illness<sup>727</sup>.

Some Catholics therefore worry that their children will be considered illegitimate if they get annulments. Canon 1137 of the Code of Canon law specifically affirms the legitimacy of children born in both recognized and putative marriages (being those later declared null). Critics point to this as additional evidence that a Catholic annulment is similar to divorce – although civil laws that recognized both annulments and divorce regard the offspring of a putative marriage as legitimate. A reason for annulment is called a *diriment impediment* to the marriage. *Prohibitory* impediments<sup>728</sup> make entering a marriage wrong but do not invalidate the marriage, such as being betrothed to another person at the time of the wedding; diriment impediments, such as being brother and sister, or being married to another person at the time of the wedding, prevent such a marriage from being contracted at all.

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<sup>727</sup> FOSTER, M., *How is a Marriage Declared Null?* [www.rcab.org/marriageglobe.html](http://www.rcab.org/marriageglobe.html) (April. 20, 1997), (last visited September 25, 2013).

<sup>728</sup> Which no longer exist in the Latin Code, CIC 83.

If someone has been married previously and the first spouse is still alive, he or she must get a Declaration of Nullity before entering into a marriage in the Catholic Church, even if neither party in the marriage was Catholic (privilege of faith being separate cases). The Catholic Church treats as indissoluble and valid every marriage when it is the first marriage for both parties. However the Church does not recognise as valid a marriage when one of the parties is Catholic but the marriage was not celebrated before a Catholic minister, unless a dispensation was first obtained<sup>729</sup>.

In order to obtain a declaration of nullity, the parties must approach a Catholic diocesan tribunal. Most applications for nullity that are heard by the tribunal are granted because one or both of the parties are judged to have given invalid consent. In order to give valid consent, the parties must give it freely. They must have a basic understanding of what they are doing and have given some thought and evaluation to their decision to enter marriage<sup>730</sup>. They must be capable of fulfilling the promises they make on the wedding day; that is, they must not suffer from any psychological infirmity<sup>731</sup> that will prevent them from giving themselves in a partnership of the whole of life that has as its ends the well-being of the parties and the procreation and education of children<sup>732</sup>.

They must mean the words that they speak on the wedding day; that is, intend to form a permanent and faithful partnership, open to sexual acts that are procreative<sup>733</sup>. Serious failures in these areas can allow a possible successful application for marriage nullity. There are other reasons that might justify an allegation of invalid consent, such as a serious error concerning the person to whom marriage promises are made<sup>734</sup>, one party being seriously deceived by the other at the time of the wedding<sup>735</sup> or one of the parties being subjected to force or grave fear without which the marriage would not be occurring<sup>736</sup>.

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<sup>729</sup> Roman Replies and CLSA Advisory Opinions 2000 "13. Canon 779 - Juridical Status of An Annulment Granted by a Coptic Orthodox Church", PEDONE, F., S., & DONLON, J., I, (eds), Canon Law Society of America, 2000, pp. 39 – 51.

<sup>730</sup> Canon 1095, Code of canon law 1983.

<sup>731</sup> Canon 1095.

<sup>732</sup> Canon 1055. (1) The matrimonial covenant, by which a man and a woman establish between themselves a partnership for the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of children; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament. (2) For this reason a matrimonial contract cannot validly exist between baptized persons unless it is also a sacrament by that fact.

<sup>733</sup> Canon 1101.

<sup>734</sup> Canon 1097.

<sup>735</sup> Canon 1098.

<sup>736</sup> Canon 1103.

Under Art. 29 any tribunal has the right to call upon another tribunal for help in instructing a cause or in communicating acts (can. 1418). If need be, rogatorial letters can be sent to the diocesan bishop so that he can take care of the matter<sup>737</sup>.

Causes of the nullity of marriage are reserved to a collegial tribunal of three judges, without prejudice to artt. 295, 299 (cf. can. 1425, § 1), with any custom to the contrary being reprobated<sup>738</sup>.

When we discuss Catholic Church annulments of marriage and its recognition problems, we should remark, that the problems arise, *firstly* from the effects of the Church's denial of a dissolution jurisdiction to civil courts by the canon 1141 provision that (Christian) marriage "cannot be dissolved by any human power or for any reason other than death", *secondly* from the dilemma of the many divorced couples who are unable to bring themselves within the criteria for Church annulment or dissolution and, therefore are excluded from valid Catholic remarriage<sup>739</sup>.

Although nowhere mentioned in the canonic code, the Church does now recognize the administrative reality of civil annulment by requiring a decree absolute as prerequisite to its own marriage annulment processes or, at least, to their determination.

Otherwise, upon canonical annulment or dissolution there could be the danger of bigamous remarriage or, in other cases, the loss or denial of legally enforceable protection for the rights of parties and their children. Catholics suffered the latter disabilities in the past when the consent of the Vicar-General, not often granted by him, was required for any access to the civil authority on matrimonial matters<sup>740</sup>.

The circumstances in which an approach of the civil authority may be permitted by the bishop are now covered in canon 1692 although it is conceded that few apply for permission.

The civil authority recognizes the Church, its institutions and members, both clerical and lay, as part of a voluntary association bound together by the contractual terms of their membership. Therefore, it is only when the executive or judicial bodies set up under the Church constitution exceed their powers with the result that the complainant member is injured in his or her property or livelihood that civil courts will intervene. If the

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<sup>737</sup> Instruction *Dignitas Connubii* from the pontifical council for legal texts, *supra* note 690.

<sup>738</sup> *Id.*, Art. 30.

<sup>739</sup> STUART, *supra* note 148, p. 16.

<sup>740</sup> DOWLING, G., *Lecture 2 July 1989 at St Francis Church Hall*, Melbourne: Melbourne University, 1989.



matter is justiciable, “the correct procedure is a civil action based on the law of trusts, contract or restraint of trade, or an application under special legislation providing for an appeal from the tribunal in question<sup>741</sup>.”

## B. CATHOLIC CHURCH ANNULMENTS OF MARRIAGE AND PROBLEMS OF ITS RECOGNITION IN LITHUANIAN CIVIL LAW

The Lithuanian Civil Code allows annulment of the concluded marriage. Although it is allowed following mutual or unilateral initiative of the spouses, it is possible only when, due to some reasons, it becomes clear that the marriage has factually broken down or will unavoidably do so. In this way the law tries to preserve the marriage as much as possible. This issue is related with both civil and church marriage. However, the church marriage is indissoluble (Catholic); it is cancelled in the Canon order or in the certain order in non-Christian confessions<sup>742</sup>. Thus, when the marriage is dissolved in the civil way, its church registration is still valid<sup>743</sup>, and the Lithuanian Constitution recognizes this marriage’s validity. Lithuanian civil law seems to be in conflict with the Constitution with regard to this question. Is it really the case?

The Constitution guarantees the State recognition of the marriage registration in church. The validity of the annulment of church marriage, allowed by the Civil Code, depends on the content attributed to the term “marriage registration”. If the registration is considered to be the verification act of the matrimonial contract done by a certain institution (State or Church) despite the contents of the contract, then all the marriages would be equally “civil”, i.e. the State would attribute the same contents to them despite the intention of the people getting married. However, this particular treatment of the concept does not cover all its aspects<sup>744</sup>.

First of all, the will of the people getting married has to be taken into account: what they try to achieve by concluding religious or civil marriage. Are they just intending to get a certain ceremony or do they wish conclude the marriage following the concept of a certain authority, a certain law. Do they handle their marriage on the basis of the

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<sup>741</sup> FORBES, J., *Disciplinary Tribunals*, Sydney: Law Book, 1990, p. 13.

<sup>742</sup> MEILIUS, *supra* note 232, p. 45.

<sup>743</sup> Lithuanian the Supreme Court civil case No. 3 K-3 – 462/2000.

<sup>744</sup> BRILIUS, *supra* note 216, p. 48.

provisions of a certain legal order? Of course, we think, that when the dividing line is between civil marriage and religious solemnization in a church ritual that the partners getting married usually choose the second variant. The matrimonial law in the Catholic Church indicates that the newlyweds have to be well introduced to their Christian duties, to that teaching about family and have to be motivated to live following such teaching. The more concrete norms are determined by the local churches; in Lithuania they are specified by certain acts of Lithuanian Bishop Conference that set requirements for the newlywed and the preparation to the Christian marriage. Thus, the bride and groom have a real intention to conclude the marriage and to form the family regulated by certain legal norms. The matrimonial ceremony remains a simple ceremony that expresses their intention and the contents of the contract. As the marriage is the matrimonial contract of the persons, who conclude it, we submit the State has to take into account the contents of the contract and to accept it before it recognizes this contract<sup>745</sup>.

The Civil Code stresses the family's protection and maintenance of marriage. Thus, it would be natural to have that Code coordinated with the Canon law (the will, expressed by the citizens on the basis of the law of the professed religion) that helps to implement the goals of the Code. For this purpose, the term "marriage registration" has to be explained in more detail as it implies not just the ceremony of sacramental blessing, but also the contents of the formed matrimonial contract and intention of the spouses.

The Civil Code seems to recognize the contents of the matrimonial contract of the religious marriage because it requires the Church to guarantee the principles of marriage formation as recognized by civil law. The State does not question the contents of the matrimonial contract of the religious marriage, does not add anything to it, neither deduces from it. It simply demands to guarantee the provisions of the Church, required for such contents of the matrimonial contract, to correspond the contents of the civil marriage. It supposes the publicly recognized and required contents of the marriage to be religious. It allows one think to that the Civil Registry offices register and the State recognizes the church marriage, but not just the church formality of the conclusion of a civil marriage. Such recognition supposes that the church marriage has to be recognized as long as it lasts, as long as it stays a church marriage. The civil annulment of the marriage does not abrogate the church marriage in the majority of confessions; it continues as the church

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<sup>745</sup> VAIČEKONIS, *supra* note 210, p. 25.

marriage, thus, it legally has to be or morally ought to be recognized as such.

Therefore, the civil annulment of church marriage, following the order set in the Civil Code, is not acceptable for certain confessions. It would be equal to the intrusion of the state into their canonic order (administration of church marriage) and in the opinion of this author can even conflict with the Constitution indicating that the State recognizes the church marriage.

With an avoided marriage under the above approach as a canonically annulled marriage where both the parties were in bad faith, they lose all the rights and duties spouses have in a valid marriage. Each of them shall have a right to recover their own property.

To sum up my personal view, if the State recognizes the church marriage, it should also recognize the exclusive annulment of this type of marriage in the ecclesiastical order. The procedure of recognition of the Canonical marriage annulment can follow a procedure similar to that of church marriage annulment recognition: the time limit<sup>746</sup> can be foreseen, within which the former spouses can inform the civil authorities about the annulment of their marriage. The State should automatically recognize the decisions of the Tribunal courts about church marriage annulment, if the marriage was concluded under canon law only.

### C. CATHOLIC CHURCH ANNULMENTS OF MARRIAGE AND PROBLEMS OF ITS RECOGNITION IN OTHER EUROPEAN CIVIL LAWS

In comparative law one can find different solutions for granting civil effects to church court decisions. Evidently there is another approach of this issue: some authors would say it is not a simple choice of a religious ceremony. We can see there are two hypotheses:

1. Where indeed a canonical decision of annulment is taken and where recognition ought to be provided;

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<sup>746</sup> Within ten days of the religious marriage the person authorised by the respective religious organisation shall be obliged to present to the local register office a notification of the religious marriage solemnised in the procedure set by the Church (confession).

## 2. Where a civil court declares divorce.

Under the Croatian Agreement between the Holy See and the Republic of Croatia Art.13 paragraph 4 the decisions of ecclesiastical tribunals to annul a marriage and decisions of the Supreme Authority of the Church on the dissolution of the marriage bond shall be communicated to the competent civil tribunal to effectuate the civil consequences of decisions or order, according to the legal norms of the Republic of Croatia.

Compulsory State controls over family matters, which is required by the Croatian Constitution, means that, before attributing civil effects to such a decision, the latter has to be, necessarily, subjected to ultimate state control. Article 13 of Croatian Agreement between the Holy See and the Republic of Croatia does not provide the method and criteria for imposing state control, and that is why this provision has caused extensive debates on legal doctrine<sup>747</sup>.

Relevant in this respect is the Italian law concerning the issue of recognitions of the civil effects of religious decisions on nullity and dissolution of canonical marriage. It is necessary to point out that in Italian law there were different forms of religious decisions<sup>748</sup>.

The system of *separatio imperfecto*, the Lateran Concordat from 1929 and respective national legislation characterize the first period which lasted from 1929 to 1984. Religious decisions on nullity of canon marriage were enforced through the procedure of official and automatic recognition<sup>749</sup>. Such automatic recognition was a consequence of the exclusive jurisdiction which religious courts had concerning annulment and dissolution of concordat (canon) marriage.

The system which today actually defines legal relations between the Catholic Church and the State of Italy is a system of *separazione imperfetta*. Canon and civil family law are two separate, independent systems of laws. However, separation is not complete because canonical marriage can have civil effect only if the parties can conclude civil marriages, on the one hand, and on the other, ecclesiastical courts decisions on the annulment of marriage are enforceable within the Italian legal system only if the decision

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<sup>747</sup> TOMLJENOVIC, *supra* note 581, p. 114.

<sup>748</sup> HLAČA, N., *Legal Regulation of Marriage in the Republic of Italy*, Rijeka: Collection of Papers of the Faculty of Law Rijeka, 1998, pp. 173-193.

<sup>749</sup> FINOCCHIARO, F., *Sentenze Ecclesiastiche e Giurisdizione Dello Stato sul Matrimonio „Concordato“*, Milano: Periodica De Re Canonica, 1984, p. 45.

in that respect is given in a special recognition procedure (*procedimento di delibazione*)<sup>750</sup>.

State control over religious decisions is required in some other countries. Very similar to the Italian provisions ~~are till 2014 of January were~~ provisions of the Maltese law combining the religious courts decisions concerning annulment of canonical marriage, as well as a decision of the Holy Father concerning dissolution of marriage<sup>751</sup>.

Under the Treaty concerning Legal Questions of 1979 between the Holy See and Spain, a religious decision to avoid the church marriage is recognized only if the state court finds that the religious decision is in accordance with civil law<sup>752</sup>.

Under the Portuguese Concordat, final religious decisions in marital disputes approved by the Supreme Court of the Apostolic Seat will be by diplomatic means sent to the Portuguese Supreme Court, which will enforce them and order their entry in the civil register<sup>753</sup>. Portuguese state courts recognize decisions of the Supreme Court of the Apostolic Seat and enforce those decisions.

<sup>750</sup> TOMLJENOVIC, *supra* note 581, pp. 117-118.

<sup>751</sup> State courts in Malta ~~must till 2014 had to~~ determine whether in the same dispute the decision has already been as that before the religious courts (Article 5 th. of the Treaty between the Holy See and the Republic of Malta Concerning Canon Marriage of 2 February 1993, AAS 89 (1997), pp. 679-694. From 2014 January the Maltese government has brought to an end the subordination of the Maltese civil courts to the Ecclesiastical tribunals over marital annulments, in a historic agreement brokered 21 years after Eddie Fenech Adami signed an understanding with the Holy See. Under the new Third Additional Protocol, judgements of the ecclesiastical tribunals over marriages concerning Maltese nationals, will retain their civil effects if their registration is ordered by the Court of Appeal, as laid down in the Marriage Act.

<sup>752</sup> TOMLJENOVIC, *supra* note 581, p. 120.

<sup>753</sup> Article 25, Concordatos II, pp. 347-348.

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### *Chapter 3*

#### *Dissolution of marriage and problems of recognition*

## I. CASES OF DISSOLUTION OF MARRIAGE

### A. CASES OF DISSOLUTION OF CIVIL MARRIAGE– SUBSANTIVE AND COMPARATIVE LAW

Under Article 3.49 of Lithuanian Civil Code there are two cases of dissolution of marriage:

1. A marriage is dissolved by the death of one of the spouses or by termination by the operation of law.

2. A marriage may be dissolved through a court decision of divorce by the mutual consent of the spouses, on the application of one of the spouses or through the fault of a spouse (spouses).

In the case of dissolution of marriage by the death of one of the spouses a marriage is dissolved:

1. By the death or a court judgement of presumption of death of one of the spouses;
2. Where one of the spouses is presumed dead, the marriage shall be considered dissolved from the date on which the court judgement becomes *res judicata* or from date specified therein.

If the spouse who has been presumed to be dead by a court judgement, turns up, the marriage may be renewed by the presentation of a mutual application of the spouses, after the annulment of the court judgement of presumption of death, to the Civil Registry Office that registered the dissolution of marriage<sup>754</sup>. A marriage may not be renewed if the other spouse had remarried or there are impediments under Articles 3.12 to 3.17 of Civil Code<sup>755</sup>.

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<sup>754</sup> Lithuanian Civil Code. Art. 3.50, § 3.

<sup>755</sup> The requirements for valid marriage we discussed in the previous chapters.

Three types of divorce exist in Lithuanian family law:

1. Divorce by the mutual consent of the spouses.
2. Divorce on the application of one of the spouses.
3. Divorce through the fault of a spouse (spouses).

In the case of the mutual consent of the spouses the following conditions<sup>756</sup> must have been satisfied:

1. Over a year has elapsed from the commencement of the marriage;
2. The spouses have concluded a contract in respect of the consequences of their divorce (property adjustment, maintenance payments for the children, etc.);
3. Both the spouses have full active legal capacity.

When divorce is on the application of one of the spouses at least one of the following conditions<sup>757</sup> must be satisfied:

1. The spouses have been separated for over a year;
2. After the formation of the marriage one of the spouses has been declared legally incapacitated by the court;
3. One of the spouses has been declared missing by the court;
4. One of the spouses has been serving a term of imprisonment for over a year for the commission of a non-premeditated crime.

On behalf of the legally incapable spouse the application for divorce may be filed by his/her guardian, a public prosecutor or a guardian.

The fault of a spouse for the breakdown of the marriage shall be established if he/she has seriously breached the duties hereof under Civil Code, which is the reason why their matrimonial life has become impossible.

A marriage shall be presumed to have broken down through the fault<sup>758</sup> of the other spouse where he/she:

1. Has been convicted of a pre-meditated crime;
2. Has committed adultery;
3. Has been violent toward the other spouse or the other members of the family;
4. Has deserted the family and has not been caring for it for over a year.

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<sup>756</sup> Lithuanian Civil Code, Art. 3.51.

<sup>757</sup> *Id.*, Art. 3.55.

<sup>758</sup> *Id.*, Art. 3.60.

The respondent in a divorce suit may argue against his/her fault and adduce facts to prove that the other spouse is at fault for the breakdown of the marriage.

Under the Principles on European Family Law the law should permit divorce and no minimum duration of the marriage should be required<sup>759</sup>.

Under Principle 1:3 the law should permit both divorce by mutual consent and divorce without consent of one of the spouses.

Under Principle 1:4:

1. Divorce should be permitted upon the basis of the spouses' mutual consent. No period of factual separation should be required.
2. Mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved.
3. This agreement may be expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse<sup>760</sup>.

If, at the commencement of the divorce proceedings, the spouses have children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined a three-month period of reflection shall be required. If they have not agreed upon all the consequences, then a six-month period shall be required. No period of reflection shall be required, if, at the commencement of the divorce proceedings, the spouses have been factually separated for six months<sup>761</sup>.

The divorce should be permitted without consent of one of the spouses if they have been factually separated for one year<sup>762</sup>.

Divorce laws vary considerably around the world. Divorce is not permitted in very few countries, such as in the Philippines<sup>763</sup> or Vatican City.

The largely Catholic population of the Republic of Ireland long has tended to be stayed averse to divorce. Divorce was prohibited by the 1937 Constitution. In 1986, the electorate rejected the possibility of allowing divorce in a referendum. Subsequent to a 1995 referendum, the Fifteenth Amendment repealed the prohibition of divorce, despite Church opposition. The new regulations came into effect in 1997, making divorce possible

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<sup>759</sup> Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses. Principle 1:1. <http://ceflonline.net/wp-content/uploads/Principles-English.pdf>. (last visited October 23, 2013).

<sup>760</sup> *Id.*, Principle 1:4.

<sup>761</sup> *Id.*, Principle 1:5.

<sup>762</sup> *Id.*, Principle 1:8.

<sup>763</sup> CONDE, C., *Philippines Stands All but Alone in Banning Divorce*, 2011, <http://www.nytimes.com/2011/06/18/world/asia/18iht-philippines18.html/>, (last visited October 23, 2013).



under certain circumstances. In comparison to many other countries, it is difficult<sup>764</sup> to obtain a divorce in the Republic of Ireland<sup>765</sup>.

In most jurisdictions, a divorce must be certified by a court of law to become effective. The terms of the divorce are usually determined by the court, though they may take into account prenuptial agreements or postnuptial agreements, or simply ratify terms that the spouses may have agreed to privately. In the absence of agreement, a contested divorce may be stressful to the spouses and lead to expensive litigation. Less adversarial approaches to divorce settlements have recently emerged, such as mediation and collaborative divorce, which negotiate mutually acceptable resolution to conflicts. In some other countries, like Portugal, when the spouses agree to divorce and to the terms of the divorce, it can be certified by a non judiciary administrative entity, where also since March 2008 an Electronic Divorce can be served. The effect of a divorce is that both parties are free to marry again<sup>766</sup>.

In spite of considerable convergence, the range of differences is still immense: while Malta<sup>767</sup> allows no full divorce at all Swedish<sup>768</sup>, Russian<sup>769</sup>, and Dutch laws<sup>770</sup> provide in some cases for what amounts to divorce on demand without any inquiry into the

<sup>764</sup> A couple must be separated for at least four of the preceding five years before they can obtain a divorce. It is sometimes possible to be considered separated while living under the same roof. Divorces obtained outside Ireland are recognised by the Republic only if the couple was living in that country; it is not therefore possible for a couple to travel abroad in order to obtain a divorce.

<sup>765</sup> Divorce laws in different countries/ <http://marriagepartner.com/forum/showthread.php?t=4081>, (last visited October 23, 2013).

<sup>766</sup> BUTT, R., *Divorce law*, 2011, <http://instalaw.com/legal-articles/divorce-law/divorce-law.html>, (last visited October 23, 2013).

<sup>767</sup> By legal definition divorce is the ending of a marriage. The laws of most nations in the western hemisphere permit divorce under certain circumstances. The first written divorce regulations were incorporated in the ancient Babylonian Code of Hammurabi. Divorce is not to be taken lightly, because of its serious impact on family, the basic unit of society. On this foundation and abetted by Catholic doctrine that holds marriage is permanent until death, Malta remains the sole nation in Europe that prohibits divorce but allows for controversial marital dispensation by a Church tribunal. [From 2014 January the Maltese government has brought to an end the subordination of the Maltese civil courts to the Ecclesiastical tribunals over marital annulments, in a historic agreement brokered 21 years after Eddie Fenech Adami signed an understanding with the Holy See.](#)

<sup>768</sup> If the spouses agree that their marriage should be dissolved they have a right to an immediate divorce (except where there is a child under sixteen years of age, making it obligatory to first go through a reconsideration period of six months), Marriage Code, Chapter 5 section 1.

<sup>769</sup> In case of mutual consent of both the spouses to a divorce, the marriage will be dissolved in the very first judicial session. If one of the spouses objects to a divorce, the court has the right to postpone the final decision on the issue, and to appoint a second session within the limits of 3 months. If in the second judicial session one of the spouses nevertheless insists on a divorce, the court pronounces the final judgement, and the marriage is terminated. The Russian law practically does not imply an opportunity for a court to reject a claim of the spouses for a divorce, irrespective of a spouse's consent or disagreement in respect of a divorce.

<sup>770</sup> The divorce must be registered within six months of the ruling becoming irreversible, otherwise the ruling ceases to have any effect and the divorce can no longer be registered.

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reasons therefore and without a waiting period. Those differences are far from being merely of a technical legal nature. They result from different ideological perceptions and different family policies. Countries with permissive divorce law generally share the conviction that law is powerless to deal with a family breakdown and generally respect the autonomous decisions of the spouses themselves regarding the dissolution of their marriage. The legislature in countries with more conservative divorce laws still seems to believe that restrictive divorce law could help in lowering the divorce rate. Therefore their divorce law is based on considerable State intervention when deciding whether or not to grant a divorce. This difference in approaches makes the current legislative differences not easily reconcilable.

The Polish court issues a divorce decree, ruling on whether one of the spouses is responsible for break-up of the marriage, and if so which spouse. If the spouses both so request, the court omits the ruling on responsibility. The grounds for divorce are that a marriage has broken down completely and irrevocably. Both conditions must obtain<sup>771</sup>.

There is only one kind of divorce in Sweden. It arises irrespective of whether or not the couple are in agreement. Under certain circumstances the divorce must be preceded by a six-month period for reconsideration. A spouse always has the right to obtain a decree for divorce and does not need to rely on any special grounds for such a decree<sup>772</sup>.

In Finland the spouses have the right to divorce after a consideration period of six months from filing the application. Divorce can be granted without the consideration period if the spouses have been separated for the last two years before filing the divorce application. Spouses are not required to list the reasons for divorce in the application. When hearing the divorce case, the District Court does not consider the spouses' personal relationship or the reasons for divorce<sup>773</sup>.

In Belgian legislation, the grounds for divorce are the irremediable breakdown of marriage (section 229 of the Civil Code) and mutual consent (section 230 of the Civil Code)<sup>774</sup>. After certain periods of proven factual separation the marriage is undeniably

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<sup>771</sup> European Judicial Network in civil and commercial matters. Divorce – Poland, [http://ec.europa.eu/civiljustice/divorce/divorce\\_pol\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_pol_en.htm), (last visited May 15, 2013).

<sup>772</sup> European Judicial Network in civil and commercial matters. Divorce – Sweden, [http://ec.europa.eu/civiljustice/homepage/homepage\\_swe\\_en.htm](http://ec.europa.eu/civiljustice/homepage/homepage_swe_en.htm), (last visited May 15, 2013).

<sup>773</sup> European Judicial Network in civil and commercial matters. Divorce – Finland, [http://ec.europa.eu/civiljustice/divorce/divorce\\_fin\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_fin_en.htm), (last visited May 15, 2013).

<sup>774</sup> Belgian Civil Code, Arts. 229-311 and Judicial Code, Arts. 1254-1318. The Civil Code on Divorce was reformed in 1974 and further amended in 1982 and 2000, also some changes was done since September

supposed to be broken down. Divorce by mutual consent requires anwritten agreement about all consequences of the divorce.

Divorce breaks the marriage bond for the future. Any legal relationship based on the status as spouse disappears. Consequently, one ex-spouse may no longer use the name of the other. The ex-spouses cease to be the other's heir. They may remarry<sup>775</sup>.

In Denmark<sup>776</sup> if both spouses apply for a divorce together they can obtain a divorce by consent through an administrative procedure at the State County Office. They must agree that they want a divorce through an administrative process - as well as upon certain ancillary matters. However, it should be noted that if the couple wish to become formally separated<sup>777</sup> they must appear before a State County Office, but if they both agree then no further attendance is required although both must sign the divorce petition<sup>778</sup>.

After the reform operated by Law 15/2005, divorce in Spain does not require a previous judicial separation nor the concurrence of causes legally determined. This means that it is possible to sue directly to get a divorce without an invocation of a cause (divorce needs always a judicial decision). The divorce procedure can be initiated at the request of one of the spouses, at the request of one of them with the consent of the other or at the request of both spouses<sup>779</sup>.

In the Netherlands<sup>780</sup> a divorce can only be obtained through a judicial process. The one single ground is irremediable breakdown of the relationship. Either one partner can ask the divorce or both on mutual request. However, as a result of the Act Opening Marriage to Same-Sex Couples, with effect from April 2001, it is now possible to obtain a so called „lightning divorce“ by converting the marriage into a registered partnership which can be done without court intervention and theoretically within 24 hours. This is effected by both spouses requesting the Civil Registry office to draw up an act of

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2009.

<sup>775</sup> Divorce – Belgium. [http://ec.europa.eu/civiljustice/divorce/divorce\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_bel_en.htm), (last visited October 14, 2010).

<sup>776</sup> § 42 Danish Marriage Act.

<sup>777</sup> One of the Danish grounds for divorce is that the parties have lived apart for 6 months after separation.

<sup>778</sup> BOELE-WOELKI, *supra* note 461, pp. 21-22.

<sup>779</sup> European Judicial Network in civil and commercial matters. Divorce – Spain, [http://ec.europa.eu/civiljustice/divorce/divorce\\_spa\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_spa_en.htm), (last visited May 15, 2013).

<sup>780</sup> Art., 1:149 and 1: 77 a Dutch Civil Code. <http://www.pdfptop.com/ebook/dutch+civil+code/>, (last visited October 10, 2013).

transformation. Registered partners can then simply dissolve their partnership by mutual consent<sup>781</sup>.

The main difference between the divorce laws has shifted from the dichotomy of fault – non-fault divorce to the discrepancy regarding the accessibility of divorce. The difference between fault-based divorce and divorce on the ground of irretrievable breakdown has dominated the picture for a long time, but is now losing its relevance. This is because there are no longer any countries in Europe which maintain exclusively fault-based divorce as the sole ground for divorce. Therefore, the spouses can always choose between fault and non-fault grounds. Moreover, uncontested fault-based divorce in countries like England and Wales or France sometimes provide a ‘shorter road’ to divorce than non-fault ones and are therefore chosen by the spouses by mutual agreement. The moral negative connotation which once rested on the fault-based divorce is also evidently lessening<sup>782</sup>.

It can be stated, when summarizing the material law of Member States of European Union, that material basis for divorces differs extremely. Sweden and Finland are examples where conditions of divorce are liberal; there is no need to indicate the reason for divorce. Whereas in Poland a spouse’s guilt must be proven or the spouses have to live separately in order to divorce. Even applying the Regulation, which unifies jurisdiction rules, situations might come up when that court shall apply its own national matrimonial law (*lex fori*) which may be extremely different from the law spouse’s domicile<sup>783</sup>.

Comparing various systems of divorce laws in accordance with the aforementioned criteria, one cannot easily find much in the way of a common core therein. In spite of the clear tendency towards the liberalisation of divorce, the differences might persist for a rather long period of time.

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## B. CASES OF DISSOLUTION OF CANON MARRIAGE

<sup>781</sup> BOELE-WOELKI, *supra* note 461, p. 22.

<sup>782</sup> ANTOKOLSKAIA, *supra* note 448, pp. 59-61.

<sup>783</sup> GRIGIENĖ, J., “Jurisdiction in International Matrimonial Matters“, *Baltic Journal of Law & Politics*, 2009 (2), 106-107.

Under canon law Can. 1141: “A marriage which is ratified and consummated cannot be dissolved<sup>784</sup> by any human power or by any cause other than death”. In the light of canon 1061 § 1 this means that in the Catholic Church the principle of absolute indissolubility of marriage is bound to three indispensable premises: the baptism of both spouses, the valid celebration of the marriages and finally its consummation. If one of the three premises is lacking the indissolubility is no longer absolute and the marriage can be dissolved<sup>785</sup>. This possibility exists notwithstanding the juridical institution of divorce is completely extraneous to canonical matrimonial law. In fact in this, alongside the seldom practiced separation of spouses<sup>786</sup> while the marriage bond remains<sup>787</sup>, there are only two forms of dissolution of marriage: the declaration of nullity<sup>788</sup> and the dissolution of the bond<sup>789</sup>. The first form by its nature is not a dissolution of the marriage bond but rather the formal establishment or finding that this marriage was never validly constituted and therefore also that the marriage never really existed<sup>790</sup>. The second form of dissolution, on the other hand, is thus a true and proper termination or breaking of a validly constituted marriage bond<sup>791</sup>. The canonical procedures to be followed in cases of dissolution of the bond of marriage are by nature substantially administrative and thus partially different from those of the processes for the declaration of nullity of a marriage<sup>792</sup>.

In the canon law in force three types of procedure for the dissolution of the bond of marriage are known, all of an essentially administrative nature. And therefore because of this administrative nature they are all distinct from the judicial processes of nullification or avoidance of marriage. There support pronounced on the basis of application of the criteria of simplicity, celerity and pastorality: (1) the procedure for the dispensation of a

<sup>784</sup> Dissolution breaks a marriage bond that is acknowledged to exist, differing from the annulment which declares that the marriage bond never existed. These cases have a long history and the Church makes reference to their possibility in Apostolic times, e.g. St. Paul (1 Cor: 7). They come under a general provision called “The Privilege of the Faith”. They include the “*Pauline Privilege*” and the “*Petrine Privilege*”. Also included under the category of dissolution are cases of “nonconsummation”.

<sup>785</sup> FLATTEN, H., *Nichtigerklärung, Auflösung und Trennung der Ehe*, Paderborn: H. Müller, 1987, pp. 477-490.

<sup>786</sup> There is no lack of those who in the work of reform have proposed remitting the question to the Conferences of bishops so that this material can be regulated according to the customs of the place, cf. *Communicationes* 10 (1987), p. 118.

<sup>787</sup> Canons 1151-1155 and 1692-1696.

<sup>788</sup> Canons 1671-1691.

<sup>789</sup> Canons 1141-1150 and 1697-1706.

<sup>790</sup> This aspect was discussed above, see in part IV, chapter 2.

<sup>791</sup> GEROSA, L., *Canon Law*, Continuum International. New York: Publishing Group, 2002, p. 32.

<sup>792</sup> HÉGY, P. and MARTOS, J., *Catholic Divorce – The Deception of Annulments*, New York: The Continuum International Group Inc, 2000, pp. 16-17.

ratified and non-consummated marriage<sup>793</sup>, (2) the process of presumption of death of the spouse<sup>794</sup> and (3) the procedures for the dissolution of marriage by reason of the *salus animarum*. For the latter type the use of the plural is obligatory because it is a question of four distinct cases, resolved with analogous but not totally identical procedures and namely: the procedure for the dissolution of the bond of marriage in the case in point of the *privilegium paulinum*<sup>795</sup>, that to be followed in the case in point of the *privilegium fidei*<sup>796</sup> or *petrinum*<sup>797</sup>, as well as those relating to the polygamist who is to be baptized<sup>798</sup> and to the convert who “by reason of captivity or persecution cannot re-establish cohabitation with his or her anabaptized spouse”<sup>799</sup>.

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<sup>793</sup> Canons 1142 and 1697-1706.

<sup>794</sup> Canon 1707.

<sup>795</sup> Canon 1148. This case is restricted to the situation in which both parties to a valid marriage are unbaptized. If one later converts and is baptized, he or she obtains the right to break the bond and remarry if the unbelieving spouse refuses to “cohabit peacefully”, which refers to the unbelievers attempts to hinder the convert in the practice of the new faith.

<sup>796</sup> The norms to be followed in this matter are not contained in the CIC, but have been published by the Congregation for the Doctrine of the Faith, cf.: *Instructio pro solutione matrimonii in favorem Fidei*, in SC pro Doctrina Fidei, Documenta inde a Concilio Vaticano Secondo explita edita (1966-1985), Vatican City, 1985, pp. 65-71.

<sup>797</sup> This is known as the “*Petrine Privilege*” because it allows the pope to dissolve a marriage in a situation in which only one party in a valid marriage is unbaptized. By definition, this means that, in the eyes of the Church, the marriage is not sacramental (to be sacramental both must be baptized). It is not found in the Code of Canon law, but developed in the U. S. after the promulgation of the Code of Canon Law in 1917.

<sup>798</sup> Canon 1143.

<sup>799</sup> Canon 1149.

## II. CONFLICTING APPROACHES OF CANON LAW AND LITHUANIAN CIVIL LAW ON THE LAW APPLICABLE TO INTERNATIONAL DIVORCE

### A. NATIONAL CONFLICTS RULES

Provisions of conflicts of law, governing validity of dissolution of marriage and separation are laid down in Article 1.29 of Lithuanian Civil Code. The first paragraph of this article establishes a general rule that legal material issues of separation and dissolution of marriage (preconditions for dissolution of marriage, grounds, legal consequences, moment of dissolution of marriage and the like) shall be governed by the law of the spouses' common domicile<sup>800</sup>. Other paragraphs of this article provide exceptions to this general rule.

What is today referred to as "separate maintenance" (or "legal separation") was termed "*a mensa et thoro*" ("divorce from bed-and-board"). The husband and wife became physically separated and were forbidden to live or cohabit together; but their marital relationship did not fully terminate. Civil courts had no power over marriage or divorce. The grounds for annulment were determined by Church authority and applied in ecclesiastical courts. Annulment was known as "*divorce a vinculo matrimonii*," or "divorce from all the bonds of marriage," for canonical causes of impediment existing at the time of the marriage<sup>801</sup>. As was mentioned in the above, the Church held that the sacrament of marriage produced one person from two, inseparable from each other: "By marriage the husband and wife are one person in law: that is, the very being of legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything"<sup>802</sup>.

The second paragraph of CC Art. 1.29 discussed issues of governing law when the spouses do not have their common domicile but their case for separation or dissolution

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<sup>800</sup> Under Lithuanian Civil Code 1.29 Article, 1§: *Separation and dissolution of marriage shall be governed by the law of the spouses' state of domicile.*

<sup>801</sup> COKE, E., *Institutes of The Laws of England*, Birmingham: Legal Classics Library, 1985, p. 235.

<sup>802</sup> BLACKSTONE, W., *Commentaries on the Laws of England*, Oxford: Legal Classics Library, 1984, p. 435.

of marriage is heard in Lithuanian court. In that case legal material issues of separation and dissolution of marriage are decided pursuant to the law of their last common domicile, or, if they never had such common domicile; then the law of the country where the case is heard (*lex fori*).

Paragraph 3 of the same Article establishes special rules for the determination of the applicable law on dissolution of marriage. This provision provides that Lithuanian law governs when all three preconditions exist: 1) one of the spouses is a Lithuanian citizen or is domiciled in Lithuania; 2) the law of the state of common citizenship of the spouses does not permit a dissolution of marriage or imposes special conditions for dissolution, unknown in Lithuanian law for instance marriage may only be dissolved if spouses have no common children; 3) Lithuanian courts have jurisdiction over that case for dissolution of marriage.

## B. CONFLICTING APPROACHES OF RELIGIOUS LAW AND CIVIL LAW ON THE LAW APPLICABLE TO DIVORCE IN THE MARGIN OF THE NEW EUROPEAN RECOGNITION REGULATION AND ON RECOGNITION OF FOREIGN DIVORCES

The European Union legal system recognizes the legal institution of divorce as do all national laws of the Member States. In this aspect, the regulations of the Member States have a common core. However, preconditions for divorce differ. The dissolution of marriage is usually founded on the same legal grounds: irretrievable breakdown, which may be supplemented by a certain number of other requirements (e.g. a required minimum period of separation). These requirements are highlighted in the comparative evaluation of state reports collected by the Commission on European Family Law<sup>803</sup>.

The rule of private international law itself is meant to be clear and strict. The purpose of a rule of this type is to promote legal certainty<sup>804</sup>: if this branch of law provides us with unambiguous pointers to a particular legal system, people are supposed to know where they stand and can arrange their lives in accordance with the legal rules.

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<sup>803</sup> ANTOKOLSKAIA, *supra* note 448, pp. 28-29.

<sup>804</sup> HOFFMANN, J., *Internationales Privatrecht*, Munich: Verlag CH Beck, 2002, p. 4.



Second, connecting factors refer to state law<sup>805</sup>. Private international law rules will not refer to religious law, unless these rules are part of the official legal system of a particular country (such as in case of Morocco)<sup>806</sup>. If a person from Turkey (i.e. having Turkish nationality or being domiciled in Turkey), which has a secular Civil Code, lives in a European country and wants principles of Islamic law to be applied to his or her civil status, he or she cannot call upon the rules of private international law to reach such an outcome. Even in the domain of contract law, there is a great reluctance to move beyond state legal systems<sup>807</sup>.

However, foreign legal systems do not always follow the same logic as our own. And this goes to the heart of private international law and the limits this discipline might be facing<sup>808</sup>. If the dispute falls under a legal institution that does not as such exist in the legal system making the classification (the law of the forum), the foreign institution has in some way to be fitted into the categories known in the legal system making the classification. This is sometimes called “substitution” or the “principle of equivalence”<sup>809</sup>.

This principle is reverted to when an institution of religious law has to be classified. Classifying an Islamic *Talaq* or *Kohl*, or a Jewish *Get* as divorce, does not require too great a stretch of the imagination. While these forms of marriage dissolution are not divorces in

<sup>805</sup> See GAUDEMET-TALLON, H., “Le pluralisme en droit international privé: richesses et faiblesses (le funambule et l’arc-en-ciel)” 312 (2005) *Collected course of the Hague Academy of international Law* at 203 explains that for private international law, a connecting factor that refers to a religion is seen as unfavourable for internationally harmonized solutions and for a good coordination of conflict rules.

<sup>806</sup> For instance, the Moroccan family law code, called the *Moudawwana*; see the website of the Moroccan Ministry of Justice: <http://www.justice.gov.ma/MOUDAWANA/Frame.htm> for the text of the code and a practical guide, (last visited December 14, 2013).

<sup>807</sup> For instance, the initial proposal by the Commission for a regulation on the law applicable to contractual obligations (Rome I) COM(2005) 650final (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF>), (last visited December 14, 2013), contained the explicit rule that parties may choose non-State law. Art 3(2): *The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community*. The provision was, however, not kept in the final EC Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008 L 177, 6, due to lack of consent. In England, in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* (No.1) [2004] 1 WLR 1784 the court of appeal considered a contract in which there was a choice for an English court and a choice for sharia law. The Court rejected applying the sharia clause saying that only rules of state jurisdictions are envisaged.

<sup>808</sup> KRUGER, Th., *The Family: A State of the Art*, in *RELIGARE Working Paper No. 2* / September 2010, [http://www.religareproject.eu/system/files/WP3\\_State\\_of\\_the\\_art\\_on\\_The\\_Family\\_e-version\\_0.pdf](http://www.religareproject.eu/system/files/WP3_State_of_the_art_on_The_Family_e-version_0.pdf), (last visited December 14, 2013).

<sup>809</sup> Professor J. Erauw taught a course at The Hague Academy for International law in the summer of 2010 on “Substitution and Principle of Equivalence in Private International Law”. The lectures of this course will be published in The Hague Academy Collected Courses.

the sense that they are not granted by a judge, private international law rules of classification are sufficiently flexible to overcome this stumbling block<sup>810</sup>.

Moreover, EU rules have their limits: a divorce obtained in a third State (non-Member of the EU) will be recognised in the EU Member States according to the national private international law rules of each Member State. The fact that one State recognizes an act of divorce does not have any bearing upon another State considering such recognition. Exequatur proceedings are strictly national. The result is that a person who has divorced outside the EU might be in a situation where one EU Member State recognizes the divorce while another does not.

The fact that the EU has taken up its competence on a certain matter also means that the EU gains (exclusive) external competence on the matter. This is relevant for research on the family in the context of the religion-secular divide, as well as for any policy advice RELIGARE<sup>811</sup> might wish to give. The principle is that a Member State cannot conclude a treaty with a third State for matters in which the EU has exclusive external competence. Now Europe has made its Regulation 1259/2010 that is precisely what has happened and what was envisaged, but only is a fact for the 15 countries who are bound in the enhanced cooperation grouping. However, the EU has become aware of the difficulties this poses, since some Member States have treaties with third States, but wish to amend these treaties. Others want to conclude treaties with particular third States with which they (or the people living on their territory) have special links. A Regulation was therefore adopted to create some room (and a particular procedure) for Member States that wish to conclude new treaties or amend old ones with third States<sup>812</sup>.

A basic principle of international procedural law is that a judgment passed by the forum of a specific country has automatic legal effect only in the country where the decision was passed<sup>813</sup>. In case of decisions concerning status, this principle is also connected to the need for legal certainty in cases involving an international element. The spouses, if they could not achieve official recognition of a foreign judgment passed in a

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<sup>810</sup> KRUGER, *supra* note 808, p. 3.

<sup>811</sup> Religious Diversity and Secular Models in Europe – Innovative Approaches to Law and Policy.

<sup>812</sup> See EC Regulation 664/2009 of 7 July establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, *OJ* 2009 *L* 200, 46.

<sup>813</sup> LÁSZLÓ, B., and KÉRDÉSEK, E., *Magyar Nemzetközi Kollíziós Magánjog*, Budapest: Logod Bt., 2003, p. 307.

matrimonial case, would face serious problems. Mention should also be made here of the situation when the dissolution of marriage is recognized in the case of the spouse living in one State, while the other spouse, lives in another Member State, if there were lack of recognition inequities would arise through limping divorce: a divorce valid in one country, but invalid in another. This ambiguous situation should be avoided by all means as it may lead to further complications as a result of its effects in the field of family law and the law of succession<sup>814</sup>.

Private international law seeks, through its connecting factors, to determine which foreign legal system should be applied to a particular situation. Normally private international law comes into play only in cases with a foreign element, i.e. cases in which a choice should be made between the application of different legal rules. If private international law retains this definition, it can be used to prevent the application of other religious rules in many cases. By the determination that a case is not international, the conclusion is made that the particular State's legal rules should govern a situation. Other legal systems, be they foreign, State or religious, are not granted entry through, the door of private international law<sup>815</sup>.

It would be pointless to deny the complexity of an issue that involves particularities specific to different religions and cultures that are deeply embedded in the collective consciousness but which have also undergone, as is the case for family law in general, profound changes over several decades. Nevertheless, within the European legal area and common area of freedom, and bearing in mind the free movement of persons, the European legislative authorities cannot ignore the fact that a significant percentage of marriages end in divorce, and that a growing number of them have an international character<sup>816</sup>.

Regarding canonical annulments granted by ecclesiastical courts, some Member States have declared that they submit such decisions for recognition to their civil courts on the basis of a concordat or convention with the Holy See (Italy, Portugal, Spain~~and Malta~~<sup>817</sup>). Canonical annulments could come into conflict with the domestic laws of other

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<sup>814</sup> KOHLER, C., *Internationales Verfahrensrecht für Ehesachen in der Europäischen Union: Die Verordnung „Brüssel II“*, NJW, 2001, p. 10.

<sup>815</sup> KRUGER, *supra* note 808, p. 9.

<sup>816</sup> Opinion of the European Economic and Social Committee on the 'Green Paper on applicable law and jurisdiction in divorce matters. Official Journal of the European Union. 2006.

<sup>817</sup> Poland has not reported its concordat with the Vatican.

Member States because these countries do not recognize the canonical grounds for annulment, or for procedural reasons<sup>818</sup>.

Where such annulments come into procedural or substantive conflict with domestic public policy or with the European Convention on the Protection of Human Rights and Fundamental Freedoms, the State where proceedings have been instituted must refuse exequatur or recognition of the ecclesiastical decision. The petitioner should then be able to institute standard civil annulment, separation or divorce proceedings. Otherwise, the only remedy available would be to appeal to the European Court of Human Rights in Strasbourg, which would unduly prolong procedures<sup>819</sup>.

Although the number of cases of negative conflict of jurisdiction may be relatively low, the Committee considers that a Community initiative is justified if such instances would result in the violation of a fundamental right, i.e. the right of access to a court with jurisdiction to grant and settle divorce, legal separation or annulment<sup>820</sup>.

### III. RECOGNITION OF FOREIGN DIVORCES

#### A. STATE DIVORCES AND THEIR RECOGNITION

There are around 122 million marriages in the EU, of which around 16 million (13 %) are considered "international"<sup>821</sup>. There were more than 1 million divorces in the 27 EU Member States in 2007, of which 140 000 (13 %) had an "international" element. Member States' courts have different ways of deciding which country's law applies to divorces. This divergence limits international couples' autonomy and choice and creates legal uncertainty. The lack of legal certainty also makes it easier for one spouse to take advantage of a partner in a weaker financial position. For example, the stronger partner may rush through

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<sup>818</sup> See the European Court of Human Rights, Application No 30882/96, (20 July 2001) *Pellegrini v. Italy*: the ECHR overturned the Italian Court's ruling enforcing the decision delivered by the court of the Roman Rota on appeal on the grounds that the latter had violated the right to adversarial proceedings.

<sup>819</sup> Opinion of the European Economic and Social Committee on the "Green Paper on applicable law and jurisdiction in divorce matters" (COM(2005) 82 final) (2006/C 24/08), 2.8, <http://eurlex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,lt&lng2=cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,nl,pl,pt,sk,sl,sv,&val=421331:cs&page>, (last visited October 23, 2013).

<sup>820</sup> *Id.*, 2.9.

<sup>821</sup> Couples of different nationalities, couples living apart in different countries or living together in a country other than their home country.

divorce proceedings in a jurisdiction that applies a law favouring him or her<sup>822</sup>. This has been used as an argument by the European Commission for it to intervene in the unification of the PIL in this part of family law – notwithstanding the principle of subsidiarity applies.

The debate regarding the content and implementation of conflicts-of-laws rules<sup>823</sup> on jurisdiction and substantive law relating to divorce in the EU ultimately takes root in provisions contained in its foundational documents. The EU was established with the signing of the Maastricht Treaty in 1992<sup>824</sup>. It is based on the initial founding document of the European Economic Community, the Treaty of Rome, also known as the Treaty Establishing the European Community (“EC Treaty”), and contains the Treaty on European Union („TEU“). One of the main purposes of the TEU was to increase cooperation in justice and home affairs, by which the Union is expected to undertake joint action in order to offer European citizens a high level of protection in the areas of freedom, security, and justice<sup>825</sup>.

The TEU also incorporates the jurisprudence of the Court of Justice, and the Union must respect the rights found in the 1950 European Convention and the common constitutional traditions of the Member States<sup>826</sup>.

In addition to the TEU and the Maastricht treaty, another important EU document, the 1997 Treaty of Amsterdam, amended certain provisions of these two previous treaties<sup>827</sup>. These amendments underscore the objective of progressively establishing a common area of freedom, security, and justice by adopting measures in the field of judicial cooperation in civil matters<sup>828</sup>. Specifically, Article 65(a) of this treaty refers to the

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<sup>822</sup> This information is presented in: Clearer EU rules for international couples briefing/<http://www.eubusiness.com/topics/living-in-eu/eu-divorce.01>, (last visited October 25, 2013).

<sup>823</sup> The aim of “conflict-of-laws rules,” or rules on applicable law, is to determine which of the different laws will apply in a particular situation, here, where there are foreign nationals living in a foreign Member State. See Commission Staff Working Document: Annex to the Proposal for a Council Regulation Amending Regulation (EC) No 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters: Impact Assessment, at 4, COM (2006) 399 final (July 17, 2006) [hereinafter Impact Assessment], available at:

[http://ec.europa.eu/civiljustice/divorce/docs/sec\\_2006\\_949\\_en.pdf](http://ec.europa.eu/civiljustice/divorce/docs/sec_2006_949_en.pdf), (last visited October 30, 2013).

<sup>824</sup> Treaty of the European Union, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter TEU]. <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>, (last visited May 14, 2013).

<sup>825</sup> See TEU Title VI; see also Treaty of Maastricht on European Union, EUROPA.EU, [http://europa.eu/legislation\\_summaries/economic\\_and\\_monetary\\_affairs/institutional\\_and\\_economic\\_framework/treaties\\_maastricht\\_en.htm](http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm), (last visited May 20, 2013).

<sup>826</sup> RAWORTH, P., *Introduction to the Legal System of the European Union*, Oxford: Oxford University Press, 2001, p. 13.

<sup>827</sup> See generally Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340).

<sup>828</sup> Rome III Regulation No 1259/2010 of 20 December 2010, <http://eur->

establishment of measures to “promot[e] the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.”

Regulation 1347/2000 of 29 May 2000 (called the “Brussels II Regulation”) which came into effect on 1 March 2001 set out the rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. This regulation has now been replaced by Regulation 2201/2003 (“the new Brussels II Regulation” or the “Brussels II *bis*”) for cases arising on or after 1 March 2005 but its rules in relation to matrimonial matters are virtually unchanged. “Matrimonial matters” includes divorce, annulment and legal separation but does not include, for example, the property consequences of marriage and the grounds for divorce<sup>829</sup>.

In July 2006, the Commission proposed a draft regulation, amending Brussels II *bis*, to determine the applicable law in divorce proceedings and to amend existing jurisdictional rules – a proposal commonly known as Rome III<sup>830</sup>. The change in the legislation’s name signifies the departure the Rome legislation makes from the content of the Brussels legislation<sup>831</sup>. “Brussels” only addresses procedural issues such as jurisdiction, recognition, and enforcement, while “Rome” has been used for instruments that contain conflict-of-laws rules. The objectives of the Rome III involved directly combating the problems associated with international couples, striving to strengthen legal certainty and predictability, increasing flexibility by introducing limited party autonomy, preventing rush to court by one spouse, and ensuring access to court<sup>832</sup>.

The Commission issued a Green Paper<sup>833</sup> and launched a public consultation on the applicable law and jurisdiction in divorce matters. As explained above, current EU law

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[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:en:PDF](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:en:PDF), (last visited October 23, 2013).

<sup>829</sup> Divorce laws in different countries/ <http://marriagepartner.com/forum/showthread.php?t=408>, (last visited October 23, 2013).

<sup>830</sup> The Rome III Regulation valid in Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia, the provisions of the agreement will apply to Lithuania from 22 nd of May, 2014, Greece also submitted a request to participate in the regulation in October 2013 which must be confirmed by the Commission within 4 months.

<sup>831</sup> BOELE-WOELKI, K., *Perspectives for the Unification and Harmonization of Family law in Europe*, Antwerp-Oxford-New York: Intersentia, 2003, pp. 781-782.

<sup>832</sup> Rome III, *supra* note, 828.

<sup>833</sup> Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (presented by the commission), 2006. 952, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0400:EN:NOT>, (last visited October 12, 2013).

does not determine what law applies when an application for divorce is being considered. For example, if an Irish person living in the UK wants to divorce a German spouse who is living in France, which national law applies? At present, the different Member States have different rules for answering this. The Green Paper proposes possible solutions to the problem.

This resulted in a new Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. Existing national rules will not be affected, and other EU countries can decide to apply the rules at any time. The procedure allows a large group of countries to solve a significant problem affecting citizens' lives without harming other EU countries. Any nation that does not initially participate can easily join to share the benefits with their citizens. The goal is to have eventually all Member States participate.

Lithuania has notified its intention to participate in the enhanced cooperation in the area of the law applicable to divorce and legal separation by letter dated 25 May 2012, which the Commission registered as received on 19 June 2012. The Commission notes that Decision 2010/405/EU does not prescribe any particular conditions of participation in enhanced cooperation in the area of the law applicable to divorce and legal separation and that Lithuania's participation should strengthen the benefits of this enhanced cooperation. The Commission adopted transitional measures for Lithuania necessary with regard to the application of Regulation (EU) No 1259/2010. Regulation (EU) No 1259/2010 shall be for Lithuania without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seized before 22 May 2014. Regulation (EU) No 1259/2010 is applied to Lithuania from 22 May 2014<sup>834</sup>.

The European Regulation allows international couples to choose the applicable law if they were to separate, as long as it is the law of a country to which they have a close connection (such as long-term residence or nationality). For example, it would allow a Swedish-Finnish couple living in Spain to agree that Swedish or Finnish law applies if they were to divorce<sup>835</sup>.

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<sup>834</sup> 2012/714/EU: Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation. *Official Journal L* 323, 22/11/2012 P. 0018 – 0019. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32012D0714:EN:HTML> (last visited 2013 November, 2013, 22).

<sup>835</sup> Clearer EU rules for international couples briefing, *supra* note 818.

Parties choosing for the application the law of the State of the nationality of one of them should at the same time indicate which territorial unit's law they have agreed upon in case the State whose law is chosen comprises several territorial units each of which has its own system of law or a set of rules in respect of divorce.

If the spouses themselves cannot agree on the applicable law, it is determined on the basis of the following connecting factors:

1. Divorce and legal separation are primarily subject to the law of the country where the spouses have their common habitual residence;
2. Failing that, where they had their last recent common habitual residence if one of them still resides there;
3. Failing that, to the law of the spouses' common nationality; and,
4. Failing that, to the law of the court before which the matter is brought<sup>836</sup>.

Under this formula, the law of the country where the divorce or legal separation was requested will apply in the vast majority of cases. For example, if an international couple living abroad, in another EU country, asks for a divorce there, the most important factor for the court would be their country of common habitual residence. That country's laws would therefore apply<sup>837</sup>.

The European Regulation also benefits people who are citizens or residents from non-participating countries and non-EU countries whose divorce or legal separation is heard before a court of a participating Member State.

The Regulation is designed to avoid that the application of foreign law leads to delays and additional costs in divorce proceedings. If a court is called upon to apply the law of another Member State, the court can turn to the European Judicial Network in civil and commercial matters (EJN) to obtain further information on the foreign law. All Member States have designated contact points that are responsible for providing information to judges about national law<sup>838</sup>.

Take the example of a married American couple living in the south of France. If one spouse moves to an EU country that does not take part in the Regulation, such as the Czech

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<sup>836</sup> "Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation". Official Journal of the European Union. 2010-12-29 (Roma III), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:EN:PDF> (last visited June 12, 2014)

<sup>837</sup> Clearer EU rules for international couples briefing, *supra* note 818.

<sup>838</sup> *Id.*



Republic, Poland or Slovakia and the other stays in France, in many cases US divorce law would apply because both spouses have a common nationality, even if they had lived in France for most of their lives. However, if the husband moves to a Member State that is part of the Regulation, French law would apply to the divorce because France is the last habitual residence of the spouses.

On the other hand, a couple from a participating country may be deprived of the Regulation's benefits if the court that is competent to hear the divorce is located in a non-participating country. That would be the case if two French people move to the U.K. and decide to separate. In any case, this French couple would be no worse off after the Regulation takes effect in the participating Member States compared to the current situation, which offers no benefits for international marriages.

Regulation No 1259/2010 applies only to the dissolution or loosening of marriage ties. The law determined by the conflict-of-laws rules of this Regulation should apply to the grounds for divorce and legal separation.

This Regulation has a universal application, i.e. uniform conflict-of-laws rules designate the law of a participating<sup>839</sup> Member State, the law of a non-participating Member State or the law of a State which is not a member of the European Union (Art. 4).

In order to allow the spouses to choose an applicable law with which they have a close connection or, in the absence of such choice, in order that the objectively applicable law might apply to their divorce or legal separation, the natural law in question should apply even if it is not that of a participating Member State. Where the law of another Member State is designated, the network created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, could play a part in assisting the courts with regard to the content of foreign law.

Where this Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings (Art. 13), this should be interpreted to mean, *inter alia*, that such a marriage does not exist in the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation.

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<sup>839</sup> Participating Member State' means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation by virtue of Decision 2010/405/EU, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union.

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons concerning matters governed by this Regulation, any reference to the law of such a State shall be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouse or spouses has or have the closest connection applies (Art. 15).

This Regulation respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and in particular by Article 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This Regulation should be applied by the courts of the participating Member States in observance of those rights and principles<sup>840</sup>.

Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation (Art. 13).

Under article 16 a participating Member State in which different systems of law or sets of rules apply to matters governed by this Regulation shall not be required to apply this Regulation to conflicts of laws arising solely between such different systems of law or sets of rules.

### *3. State divorces from non-EU countries and their recognition in different countries of the EU*

#### *3.1. State divorces from non-EU countries and their recognition in Lithuania*

As was mentioned in a previous chapter dissolution of marriage shall be governed by the law of the spouses' State of domicile. If the spouses do not have their common domicile, the law of the state of their last common domicile shall apply, or failing that, the law of the state where the case is tried. If the law of the state of common citizenship of the spouses does not permit a dissolution of marriage or imposes special conditions for dissolution, the dissolution of marriage may be performed in accordance with the law of

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<sup>840</sup> Charter Of Fundamental Rights Of The European Union, (2010/C 83/02). Available on the Internet: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>, (last visited 2013 November, 2013, 22).

the Republic of Lithuania if one of the spouses is also a Lithuanian citizen or is domiciled in the Republic of Lithuania<sup>841</sup>.

The application for the recognition and (or) enforcement of the foreign judgement and arbitration award in the Republic of Lithuania as well as the application related to refusals to recognize foreign judgements and arbitration awards can be submitted by a person interested in the recognition and (or) enforcement of the foreign judgement and arbitration award (Part 1 of Article 811 of the Code of Civil Procedure).

Foreign effective judgements concerning the dissolution of marriage, separation or recognition of void marriage according to which the records of civil acts of the Republic of Lithuania are amended and renewed, do not require to be recognized while applying special procedures. Having found out information about the amendment and renewal of the records of civil acts of the Republic of Lithuania, within a period of one year the interested parties can apply to the Court of Appeal of Lithuania (pursuant to Articles 810, 811 and 812 of the Code of Civil Procedure) while requesting to make the record void (Part 3 of Article 809 of the Code of Civil Procedure). The record of marriages which were dissolved in foreign countries is kept according to the chapter X of civil registry rules of the Republic of Lithuania.

Under Chapter X of civil registry rules of the Republic of Lithuania, if citizens of the Republic of Lithuania dissolved their marriage after 11 March 1990 in a foreign country, they have to include the dissolution of their marriage in the record of the civil registry office regarding their place of residence. If citizens of the Republic of Lithuania do not have residence in the Republic of Lithuania, the dissolution of their marriage is to be included in the record of the civil registry office regarding their last place of residence in the Republic of Lithuania or the record of Vilnius Civil Registry Office.

When one registers the dissolution of marriage announced in a foreign country in the record, a foreign effective judgement regarding the dissolution of marriage or a divorce certificate must be submitted.

The dissolutions of marriage announced in a foreign country are included in the record of the civil registry office while registering the dissolution of marriage as well as issuing a divorce certificate. If one of the spouses who dissolved the marriage in a foreign country is dead, the dissolution of marriage is included in the record of the civil registry

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<sup>841</sup> Lithuanian Civil Code. Art. 1.29.

office while registering the restored record of the dissolution of marriage as well as issuing a divorce certificate.

When registering the citizen's of the Republic of Lithuania dissolution of marriage announced in a foreign country in the record, the date of issue is considered to be the one given in a divorce certificate issued by the institution of a foreign country.

There are judgements of welfare or justice institutions of the Republic of Armenia, the Republic of Azerbaijan, the Republic of Kazakhstan, the Republic of Ukraine, the Republic of Uzbekistan, the Republic of Moldova and the Federation of Russia recognized without taking any special legal proceedings and by their nature not demanding the realization in civil and domestic proceedings in the Republic of Lithuania<sup>842</sup>.

There are effective judgements of justice institutions of the Republic of Belarus recognized without taking any special legal proceedings and by their nature not demanding the realization in the Republic of Lithuania if 1) the courts of the Republic of Lithuania did not award the effective judgement in this case earlier, and 2) the case lies outside the exceptional competence of the courts of the Republic of Lithuania as per treaty of legal assistance between the Republic of Lithuania and the Republic of Belarus, with the exception of unforeseen cases the laws of the Republic of Lithuania are applied. Analogous provisions are applied for the judgements of welfare, the dissolution of marriage awarded by the competent institutions of the Republic of Belarus<sup>843</sup>.

In order to disclose similarities and differences of the State divorces from non-EU countries and their recognition in sections 3.2-3.5 of this thesis, I will present State divorces and their recognition for decisions from outside EU in England, Germany, Belgium and Estonia.

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<sup>842</sup> Part 2 of Article 51 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Armenia in civil, domestic and criminal proceedings; Part 2 of Article 49 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Azerbaijan in civil, domestic and criminal proceedings; Part 2 of Article 49 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Kazakhstan in civil, domestic and criminal proceedings; Part 2 of Article 42 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Ukraine in civil, domestic and criminal proceedings; Part 2 of Article 51 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Uzbekistan in civil, domestic and criminal proceedings; Part 2 of Article 49 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Moldova in civil, domestic and criminal proceedings; Part 2 of Article 50 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Federation of Russia in civil, domestic and criminal proceedings.

<sup>843</sup> Article 53 of the treaty of legal assistance and legal relations between the Republic of Lithuania and the Republic of Belarus in civil, domestic and criminal proceedings.

### 3.2. State divorces and their recognition in England for decisions from outside EU

England strives to recognize both foreign marriages and foreign divorces. English courts may ignore incapacities due to, for example, racial laws. They are tolerant of other cultures and social customs, for example marriages to “children”, even though they may be invalid here. The Court balances marriages which would be “*offensive to the conscience of the English Courts*” (Cheni (otherwise Rodriguez) v Cheni [1962] 3 All ER 873) with the need for “*common sense, good manners and reasonable tolerance*” and international comity<sup>844</sup>.

The recognition of foreign divorces by the English Courts is contained in the provisions of the Family Law Act 1986 and, within Europe, by the provisions of Council Regulation (EC) 2201/2003 known as Brussels II bis, simultaneously codified by Dicey and Morris R 78 - 86<sup>845</sup>.

A divorce dissolves the marital status. Accordingly, where a local divorce had the effect of dissolving the parties marital status and such divorce was entitled to recognition in England, it was not then for the English court to look at the validity or otherwise of other marriage ceremonies between the same couple, *D v. D (Nature of Recognition of Overseas Divorce)* (2006) 2 FLR 825. Specifically the English court could not grant an English divorce if it had already recognized the foreign divorce. A foreign and recognised divorce has the same status on the parties as in English divorce: Dicey and Morris rule 87<sup>846</sup>.

### 3.3. State divorces from outside EU and their recognition in Germany

In Germany in accordance with the general principles of constitutional and international law, court judgements and similar sovereign acts only have direct legal effect within the territory of the State in which they were passed or performed. Germany is free to determine whether and under which conditions it will recognize foreign sovereign acts, insofar as it is not bound to do so by treaty. The dissolution of a marriage is thus basically only valid in the State in which it was dissolved. In Germany a marriage dissolved abroad continues to be viewed as still in existence<sup>847</sup>.

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<sup>844</sup> HODSON, D., *Recognition of Foreign Marriages and Divorces*,  
<http://www.davidhodson.com/assets/documents/recognition.pdf>, (last visited December 20, 2013).

<sup>845</sup> *Id.*

<sup>846</sup> DICEY *supra* note, 517.

<sup>847</sup> For example, the man and wife continue to be listed as such in German civil status records and registers of

Formal recognition is in principle required for the marriage to be effectively dissolved in the eyes of the German law.

To enter the divorce in the German civil status records, a certificate from the country where the divorce was obtained is nonetheless required in addition to the divorce decree. This certificate must take a certain form (see Article 33, Annex IV of the Regulation)<sup>848</sup>.

In all other cases, the formal recognition of the foreign judgement in matrimonial matters must be obtained, pursuant to Article 7, section 1 of the Family Law Amendment Act (Familienrechts-Änderungsgesetz). The Land judicial administration authorities are as a rule responsible for the recognition of such foreign judgements. Their duties may also be delegated to the Presidents of the Higher Regional Courts<sup>849</sup>.

#### *3.4. State divorces from outside EU and their recognition in Belgium*

Under Belgian code of Private International law<sup>850</sup> a foreign judgment will be recognized in Belgium, in whole or in part, without there being a need for the application of the procedure set out in Article 23. If the recognition issue is brought incidentally before a Belgian court, the latter has jurisdiction to hear it (Art. 22, § 1). Any interested party, and in matters regarding the status of natural persons also the advocate-general, can in accordance with the procedure set out in Article 23 request that the judgment be recognized or declared enforceable, in whole or in part, or that it be declared not recognizable or not enforceable, in whole or in part (Art. 22, § 2).

When an action for recognition cannot be introduced before the court referred to in the first part, the plaintiff may seize the judge of its domicile or residence in Belgium. In the absence of such domicile or residence in Belgium, the plaintiff can seize the court of the district of Brussels (Art. 23, § 2).

Divorce and legal separation are governed: by the law of the State where both spouses have their habitual residence when the action is introduced; in the absence of a habitual residence on the territory of one State, by the law of the State on the territory of which the last joint habitual residence of the spouses was located if one of them has his

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residents until the foreign divorce has been recognized (a "limping marriage"). It is thus not possible to enter into a new marriage in Germany before the divorce has been recognized, as it would be bigamous.

<sup>848</sup> European Judicial Network in civil and commercial matters. Divorce – Germany. [http://ec.europa.eu/civiljustice/divorce/divorce\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_ger_en.htm), (last visited May 15, 2013).

<sup>849</sup> European Judicial Network in civil and commercial matters, *supra* note, 844.

<sup>850</sup> Belgium Law of 16 July 2004 Holding the Code of Private International Law [applicable since 1 October 2004 - as amended, status 20th April 2010]. Articles 22-25.

habitual residence on the territory of that State when the action is introduced; in the absence of the habitual residence of one of the spouses on the territory of the State where the last joint habitual residence was located, by the law of the State of which both spouses have the nationality when the action is introduced (Art. 55; § 1).

Under the Rome III Regulation spouses may however choose the law, which will apply to the divorce or the legal separation. The law chosen by the spouses must be consonant with the fundamental rights recognised by the Treaties and the Charter of Fundamental Rights of the European Union<sup>851</sup>. The spouses can only designate one of the following laws: the law of the State of both spouses' nationality when the action is introduced; or Belgian law. The choice has to be expressed at the time of the first appearance in court. The choice now permitted by the Rome III Regulation is clearer and parties can see up-front what the possibilities are in the participating Member States. However, the uncoordinated choice still remains in the courts of non participating Member States<sup>852</sup>. It is important to note that the choice must be for the law of the State where the spouses were last both habitually resident. A habitual residence should be in the same State, but not necessarily living together, in the same house<sup>853</sup>.

A unilateral repudiation, which is defined in the code of private international law as foreign formal deed establishing the intent of the husband to dissolve the marriage without the wife having the same right cannot be recognized in Belgium. Look at Article 57 and in particular Article 57, §2, 2 and 3 Belgian Code of private international law concerning the recognition of foreign repudiations in Belgium: there you find the rule saying that we do not accept under any circumstance that when one of the two partners in a marriage is either a national or a resident of Belgium or of any other (Western or developed) country in which such repudiations are not known in the law... the repudiation of a woman by a man will never be recognized in Belgium<sup>854</sup>.

Such deed can however exceptionally be recognized in Belgium, after verifying whether the following cumulative conditions are satisfied: the deed has been sanctioned by

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<sup>851</sup> The European Union Divorce Law Pact or Rome III Regulation, formally Council Regulation (EU) No 1259/2010 of 20 December 2010. Art. 16.

<sup>852</sup> KRUGER, Th., *Rome III and Parties' Choice*, 2012, p. 2. Available at SSRN: <http://ssrn.com/abstract=2173334> or <http://dx.doi.org/10.2139/ssrn.2173334>, (last visited May 11, 2013).

<sup>853</sup> *Id.*, p. 5.

<sup>854</sup> ERAUW, *supra* note 649, p.p. 517-519; ERAUW, J., "Verstoting: Weigeren is de regel - Erken eventueel bij afwezigheid van enig contact met België" (*Foreign repudiation decrees are normally denied recognition in Belgium*), in: *the online law-review Tijdschrift@ipr.be*, 2003, Nr 1, p. 43 – 45.

a judge in the State of origin; neither of the spouses had at the time of the certification the nationality of a State of which the law does not know this manner of dissolution of the marriage; neither of the spouses had at the time of the certification their habitual residence in a State of which the law does not know this manner of dissolution of the marriage; he wife has accepted the dissolution in an unambiguous manner and without any coercion (Art. 57; § 2).

### *3.5. State divorces from outside EU and their recognition in Estonia*

In Estonia the order of recognition of a foreign decision may be based on an international agreement to which Estonia is a party. According to an international agreement, separate proceedings for recognition may be unnecessary. In 2002, Estonia acceded to the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations<sup>855</sup>.

The decision on divorce or legal separation, made by a foreign court or by some other agency, shall be recognised, if:

1. Under the law of the country making the decision it is not possible to appeal against the divorce or legal separation;
2. Under Estonian law, the court or other agency of the foreign country was competent to decide upon divorce or legal separation;
3. The defendant who did not participate in the court proceedings was served a summons in due time pursuant to the law of that state on at least one occasion;
4. The divorce proceedings in Estonia were not instituted prior to institution of the proceedings in the country for whose decision on divorce or legal separation recognition is sought.

The divorce or legal separation shall also be recognised, if:

1. The countries of the residence of both spouses recognise the divorce or legal separation or both spouses agree with recognition in Estonia and the defendant who did not participate in the proceedings was served a summons in due time pursuant to the law of that state on at least one occasion and;
2. The divorce proceedings in Estonia were not instituted prior to institution of the proceedings in the country for whose decision on divorce or legal separation recognition is sought.

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<sup>855</sup> European Judicial Network in civil and commercial matters. Divorce – Estonia. [http://ec.europa.eu/civiljustice/divorce/divorce\\_est\\_en.htm#14](http://ec.europa.eu/civiljustice/divorce/divorce_est_en.htm#14), (last visited May 1, 2013).



The court may refuse to recognise the divorce or legal separation, if recognition would manifestly be contrary to the essential principles of the Estonian law (public order)<sup>856</sup>.

To sum up, significant differences exist among the Member States' divorce laws. Each Member State has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters. The role of the EU is mainly concerned with ensuring that decisions made in one country can be recognized in another. It also has a role in trying to establish which country has jurisdiction to hear a particular case and then also, for those countries bound in the enhanced cooperation, to determine the applicable law for the dissolution by divorce.

Next chapter of this work will take a closer look at other religious divorces<sup>857</sup>

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## B. RELIGIOUS DIVORCE UNDER ISLAMIC AND JEWISH RELIGIOUS LAW OCCURRING BEYOND EUROPE'S BORDER AND THEIR CIVIL RECOGNITION

### 1. Introduction

Divorce is controversial in every religion. On the one hand, it brings about the disintegration of family life with consequent unhappiness for the children born of that marriage<sup>858</sup>. On the other hand, dissolution of marriage might be desirable when the spouses can no longer live in harmony and when they have lost all mutual respect for one another.

All religions provide their members with guidance on matters of marriage and divorce; however, religions vary considerably in the strictness of their practices. No religion encourages divorce, but whereas Roman Catholicism continues to forbid divorce, Jewish and Islam rules permit it. The influence of the Catholic Church on family life has declined since the 1960, but it still appears to influence its members' divorce decisions<sup>859</sup>.

<sup>856</sup> European Judicial Network in civil and commercial matters, *supra* note, 850.

<sup>857</sup> I will discuss peculiarities and problems of religious divorce in Islam and Jewish law in the Western liberal countries.

<sup>858</sup> SILVA, *supra* note 606, p. 28.

<sup>859</sup> CLARKE-STEWART, A. and BRENTANO, C., *Divorce— Causes and Consequences*, Yale: Yale University Press, 2006, pp. 48-51.

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Some countries still maintain that the divorce laws as they are formulated within the religious system deserve the respect of the civil legal system or may even consider the field pertaining to divorce to fall under the observation of the religious laws. Other countries have a strictly secular system of divorce law that is part of the civil law system of the country. Between these polarities are various interactions between the religious system and the civil legal system that for example allow in the civil divorce law a distinct influence of a religious approach or that allow parties a choice. In several EU countries interactions between religious and civil law systems in marriage and its dissolution, show the civil law as dominant. Even then we do acknowledge the existence a parallel system of religious law regarding divorce that is valid for the religious authorities.

*2. Religious divorce in Islamic family law and its recognition or non-recognition in European Member States*

*a) What is the Islamic divorce law?*

Islam occupies the middle ground between Christianity and Judaism with respect to divorce. Marriage in Islam is a sanctified bond that should not be broken except for compelling reasons. Couples are instructed to pursue all possible remedies whenever their marriages are in danger. Divorce is not to be resorted to except when there is no other way out. In a nutshell, Islam recognizes divorce, yet it discourages it by all means. Let us focus on the recognition side first. Islam does recognize the right of both partners to end their matrimonial relationship. Islam gives the husband the right for Talaq (divorce).

Islamic law holds that both the husband and the wife have the right to divorce, but a wife may be unilaterally divorced by her husband without a court hearing and without obtaining her consent. Divorces arise from the will of the husband or the mutual consent of the spouses, or if the wife can show non-payment of maintenance; infirmities hindering the realization of the object of marriage; refusal of the husband to cohabit with his wife for more than than four months; conviction of the husband, punishable with the loss of civil rights for more than one year<sup>860</sup>.

In the view of Islam, divorce means the immediate and future annulment of the marriage contract. This is confirmed in a plain declaration saying:

“I hereby divorce you”. Or indirectly saying: “I hereby consider you unlawful to

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<sup>860</sup> ALTSTEIN, H., *Global Perspectives on Social Issues: Marriage and Divorce*, Lexington: Lexington Books, 2003, p. 10.

me<sup>861</sup>».

It can also be confirmed by a judge or in the absence of judge, a Muslim khadi, who is a leader or religious administrator, on basis of the wife's request<sup>862</sup>. This process is known as *Khulu*<sup>863</sup>.

The legal term for divorce in Islam is "*Talaq*". In its literal sense it means "undoing of, or release from a knot". It is a term used by many Muslim jurists to denote the release of a woman from a marital tie. The process of "*Talaq*" consists of many components, which are essential to the proper and valid undoing of a marital bond. As part of this intricate process, the *Quran* prescribes that, if a man decides to repudiate his wife, he should call two men of justice (preferably Muslims) to witness his action:

"And take for witnesses. Two persons from among you, endued with justice. And establish the evidence<sup>864</sup>."

There are no specific words prescribed in the *Quran* that are to be used by a husband to impose divorce upon his wife. However, the words should convey the intention of the husband to dissolve the marriage. It is necessary that he must be of sound mind, not a minor, and be capable of using his own discretion to reach such a decision. Therefore, a divorce pronounced by an insane man or a child is not considered to be valid<sup>865</sup>.

Divorce in Islam<sup>866</sup> comes under three categories:

- *raj'i* (reversible)
- *baynounah soghra* (minor separation)
- or *baynouna kobra* (major separation).

In case divorce is declared by the husband, he can take his wife back within three months. This is without any legal procedures, if they mutually decide it - like they regret their rushing into divorce. In this case, the divorce is termed as *raj'i* or reversible divorce<sup>867</sup>.

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<sup>861</sup> Repudiation is forbidden in family law code of Tunisia.

<sup>862</sup> ABU AISHA, B., *Talaq: Divorce on the Scales of Islamic Sharia'h*, London: Nida 'ul Islam, 2003.

<sup>863</sup> Divorce at the instance of the wife with the husband's agreement and on condition that she foregoes her right to a dowry.

<sup>864</sup> Quran sura 65, aya 2.

<sup>865</sup> SULTAN, R., *Divorce in Islam*, iica.org. [http://www.zawaj.com/articles/divorce\\_reem\\_sultan.html](http://www.zawaj.com/articles/divorce_reem_sultan.html), (last visited May 15, 2013).

<sup>866</sup> Men have the right to divorce. If a man dislikes keeping his marriage for any reason, he divorces his wife and compensates her financially by paying her what is termed mut'a payment. This is in addition to the regular financial sustenance for her living, in case she has the custody of their children.

<sup>867</sup> FADL FARAG, A., *Laws of Divorce in Islam*, [http://www.zawaj.com/articles/divorce\\_laws.html](http://www.zawaj.com/articles/divorce_laws.html), (last visited September 18, 2013).

But in case of *khul'*, which is the second category, the husband can't remarry his divorcée till all the legal procedures are done, all over again, and the husband pays new dowry for her.

However, the divorce itself remains valid even if the courts find criminal behavior on the part of the husband and subject him to punishment. Pakistan and Bangladesh require that the husband provide a letter stating his wish to divorce to a designated public official along with a copy to his wife. Again, Tunisia has completely abolished extra juridical divorces and all requests for separation must be brought before a civil judge<sup>868</sup>.

Divorce can happen three times in the couple's lifetime. The third divorce falls in the third category, because they cannot go back to one another, till after the wife 'happens' to marry someone else, then 'happens' to get divorced by him. In this case, she can go back to her first husband. Such a tough rule was made as a punishment and a way of preventing people from misusing this tolerant ruling of permitting divorce. The word 'happens' is parenthesized because the woman's new marriage and divorce should come naturally without planning, as many people might do to legalize her return to the first husband<sup>869</sup>.

In some cases, uttering the words of divorce become invalid. Among these cases is when the husband was drunk, or was forced to utter them by someone else, or divorced in a complete loss of temper to the extent that he is unaware of what he is saying. If the husband was in an abnormal State of mind, such as temporary madness, or in an epileptic attack or or unconscious the divorce is null and void<sup>870</sup>.

It should be noted that in Islam the wife also has the right to demand divorce of her husband. However, instead of "*Talaq*" it is termed "*Khul*" and in its literal sense it means releasing or removing the dress from the body. This is an appropriate allusion to the verse of the Holy *Quran*, which says:

"Women are your garment and you are their garment"<sup>871</sup>.

The *Maliki* jurists define "*Khul*" as "a divorce by giving something in return"<sup>872</sup>. According to the *Hanifi*, *Shafii* and *Hanbali* jurists," it is the end of a marital relationship

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<sup>868</sup> MAIER, S., *The Shari'a in German and French Courts: Much Ado About Nothing?* New York: Consortium for European Studies, 2009.

<sup>869</sup> CARROLL, L., "Muslim Women and 'Islamic Divorce' in England", *Journal of Muslim Minority Affairs*, 1997 (17), 97-115.

<sup>870</sup> FADL FARAG, *supra* note 871, pp. 58-60.

<sup>871</sup> Quran sura 2, aya 182.

with consent and with the utterance of the word "*Khul*". The Holy *Quran* permits a wife to ask for a divorce only on legitimate grounds, such as fears of cruelty or desertion<sup>873</sup>. It states: "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best<sup>874</sup>."

*b) The non-recognition or exceptional recognition of repudiations done outside the EU*

Western liberal countries such as France and Germany<sup>875</sup>, Austria, Denmark and others have quietly enforced Islamic family laws and used the *shari'a* as a co-equal source of law for decades. Those countries have displayed significant flexibility in their responsiveness to the needs of a "multicultural society" in the legal sphere. While there is little willingness to accord official legitimacy to practices that are considered 'illiberal' by Western standards, such as the *talaq* divorce or polygamy, notwithstanding those countries have tacitly recognized the existence of polygamous marriages in their societies and have granted certain civil effects to these arrangements while considering legal protection to the wives and children.

I now discuss how the European member States taken position when the recognition is requested of a repudiation done in a Muslim country (i.e. outside the EU). National principles of recognition apply to those non-EU divorces.

The presence of ethnic, religious or cultural minority groups formed through waves of immigration confronts the institutions of receiving states with particular problems and challenges. One of the key challenges is faced by the receiving state's judicial branch. The Belgian judiciary's confrontation with requests for recognition of *talaq* is one example. *Talaq*, or repudiation of the wife, is still accepted, although not in its original form, in many modern Muslim nations. In 2004, the Belgian legislature adopted the Code of Private International Law ("PIL Code")<sup>876</sup>. *Talaq* is specifically addressed in Article 57 of the PIL Code. This Article removes *talaq* from the applicable scope of the general recognition theory. The response that Article 57 of the PIL Code provides to *talaq* is

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<sup>872</sup> This *Maliki* School has an important influence, for example in the family code of Tunisia.

<sup>873</sup> SULTAN, R., *supra* note, 869.

<sup>874</sup> Quran sura 4, aya 128.

<sup>875</sup> In German jurisprudence and the resulting complexity of most legal cases, involving questions of domestic law, religious law and custom, as well as different foreign laws and rules of international private law. In most cases, such as the *Iranian German Dowry Cases* the courts applied Islamic religious law, even when the husbands claimed that a Muslim ceremony had no legal validity in Germany, and held that the dowry was an integral part of religious law and practice and upholding most claims brought forth by the wives.

<sup>876</sup> Act of 16 July 2004 concerning the Code of International Private Law, B.S. 27 July 2004.

decisively negative: recognition is only granted in the exceptional situation where no *Inlandsbeziehung* existed at the time of the *talaq* pronouncement.

During the parliamentary debate on Article 57 of the PIL Code, the lack of uniformity in decisions by the registrar of births, marriages and deaths (“*officiers d’état civil*”) under the old regime was criticized<sup>877</sup>. Because no declaratory procedure for recognition of judgments exists in Belgium, whether to recognize a *talaq* judgment was and still is in practice primarily the responsibility of public servants, but indeed such administrative recognition remains precarious and subject to revision under the possible posterior control of a court with competence for definitive recognition. When the jurisprudence is not clear, one can hardly expect predictable results at this level. It was not surprising, therefore, that during this debate a cry for clarity was expressed by women’s organizations advocating the rights of repudiated women in Belgium<sup>878</sup>. I have described the outcome for the recognition of repudiation under the Belgian code.

Neither Germany<sup>879</sup> nor France<sup>880</sup> recognizes the *talaq* divorce *per se* as a legitimate form of divorce on domestic soil. Nonetheless in the 1980s and 1990s, some French judges have, relying on bilateral agreements with Morocco and Algeria, accepted the validity of the effects of the *talaq* on French soil, if the *talaq* was pronounced in their home country and on condition that the husband and wife present themselves before French courts. The rationale was that the *talaq* was practiced by a minority of Muslim families in any case, but if the husband were forced to present himself before the court, at least the wife would have the opportunity to express her concerns and demand the payment of any dowry still due to her in a legal forum. One of these cases decided on this quasi international basis was the famous *Simitch* Case (1985). The case established, that instead of appearing before a French court a couple might make their plea before any court in a country with which they have any reasonable connection. Naturally, most couples appeared (presumably because the husband insisted) before a court in their home country, which, in almost all cases, upheld the *talaq* by the husband. Since this practice was found to be so greatly abused, the logic has not found great resonance with the French Cour de

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<sup>877</sup> Advisory Committee Report Senate 6; The Legal Committee, giving advice to the Belgian Senate on Article 57 of the IPL Code, consulted several organizations advocating the rights of repudiated women.

<sup>878</sup> *Id.*

<sup>879</sup> ROHE, M., *Islamic Law in German Courts*, Tübingen: Mohr Siebeck, 2003, pp. 46-59.

<sup>880</sup> Lithuania, like other European countries doesn’t recognise polygamy by law and *talaq* divorce, because it is in opposition to Western values of gender equality and public morals.

Cassation and in cases in the 1990s before it, the right to a unilateral divorce was prohibited under almost all circumstances<sup>881</sup>.

The jurisprudence and legal literature in both France<sup>882</sup> and Germany agree that the unilateral repudiation of a wife that leaves the woman without any legal recourse is contrary to the public order as it violates the principle of gender equality. The argument that the *talaq* is a legal form of divorce in Muslim family law and, as such, recognized by almost all civil codes of most Muslim countries is not considered *per se* a sufficient reason to recognize its validity and enforceability on German or French soil. However, some scholars have urged a more differentiated view of the *talaq* divorce as some marriage contracts permit the wife a unilateral *talaq* against their husbands. To date, there are only two conditions under which German courts recognise the *talaq*: if the wife agrees in front of a German court or if the marriage could be dissolved in Germany for the same reason. On the former basis, in the Lebanese *Talaq* Case (1992) a judge at the *Amtsgericht Esslingen* himself dissolved the marriage after the husband had pronounced the *talaq* in front of him. The latter condition informed the Iranian *Talaq* Case (1996) in which the *Oberlandesgericht Köln* ended the marriage between two Iranian Muslims that had irretrievably broken down. It can be argued, of course, that if the wife agrees to the repudiation, then the divorce is not unilateral anymore. Likewise, if the marriage could be divorced for the same reason based on German law, the accommodation of the *talaq* is not an example of legal pluralism<sup>883</sup>.

Generally speaking, however, the jurisprudence is clear: the unilateral repudiation of a Muslim wife by her husband is not permitted and not recognized by German courts based on public policy. In a more recent case, the Jordanian-German *Talaq* Case (1998) the *Oberlandesgericht Stuttgart* refused again to recognize the *talaq* that the husband had pronounced against his wife because the inability of the wife to have any say in the matter was in violation of the German “ordre public”<sup>884</sup>.

*c) The broader view of foreign repudiations and their eventual effect in Europe*

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<sup>881</sup> CHIRANE, A., *Conflict and Division within Muslim Families in France*, London: Grey Seal Books, 1995, pp. 16-20.

<sup>882</sup> DÉPREZ, J., *Statut Personnel et Pratiques Familiales des Etrangers Musulmans en France*. Paris: L'Harmattan, 1996, pp. 57-81.

<sup>883</sup> EL-HUSSEINI, R., “Le Droit International Privé Français et la Répudiation Islamique”, *Revue Critique de Droit International Privé*, 1999 (88), 427.

<sup>884</sup> ROHE, *supra* note 879, pp. 46-59.

The question of the recognition of repudiation in Europe should be considered in the light of the changes that have occurred in European countries' laws concerning divorce and those that came about in the laws on repudiation of certain Muslim countries. Since a few years, several laws enforced in Muslim countries tend to submit repudiation to some forms of legal control, by limiting its nature of private act proven by a religious administrative deed that is altogether subject only to the exclusive will of the husband. In turn, the law and the case law in European countries are moving in the direction of granting to each married partner a "right" to divorce without any need to put forward particular reasons to justify his/her decision, and without any possibility left to the judge to deny the declaration of marriage dissolution to the applying party even in case of opposition of the other party. As a consequence, once the interests of the wife and the children are safeguarded by the intervention of the judicial authority, the distance between repudiation and divorce is no longer such as to prevent from recognizing the former in a European country law. Obviously, there remains the problem that, according to the Islamic law and the rules of Muslim countries admitting repudiation, this form of marriage dissolution is only accessible to husbands, while wives are obliged to resort to divorce in order to put an end to a marriage union. However, if repudiation is subject to legal control, this disparity does not seem to have the necessary strength to require the automatic application of public order clauses that would necessarily always result in a rejection in the actual cases examined by the judge.

In conclusion, polygamy and repudiation remain open issues, which, despite the rapid developments occurring in European countries' family law, are likely to find no permanent and shared solutions in the near future.

### *3. Religious divorce in Jewish law and its recognition or non-recognition in European Member States*

#### *a) The divorces under the Jewish law*

Halakha (Jewish law) allows for divorce. In Jewish law, a view of marriage as a contract prevails: there is a wide freedom to dissolve marriage; yet, at the same time, religious authorities have limited powers to resolve difficult situations (e.g., when the



husband refuses to give the *ghet* (divorce paper) to his wife) and to settle disputes<sup>885</sup>.

Judaism generally maintains that it is better for a couple to divorce than to remain together in a state of bitterness and strife. It is said that *shalom bayit* (domestic harmony) is a desirable state. In general, it is accepted that for a Jewish divorce to be effective the husband must hand to the wife - and not vice versa - a bill of divorcement, called a *get*<sup>886</sup>, which also acts as proof of the divorce. From ancient times, the *get* was considered to be very important to show all those who needed to have proof that the woman was in fact free from the previous marriage and free to remarry<sup>887</sup>. In Jewish law, besides other things, the consequences of a woman remarrying and having a child while still legally married to another is profound: the child would be a *mamzer*<sup>888</sup>, to be avoided at any cost. Also, the woman would be committing adultery should she remarry while still legally married to another. An enactment called *Herem de-Rabbenu Gershom*- accepted universally throughout European Jewish communities--prohibited a husband from divorcing his wife against her will<sup>889</sup>.

Judaism recognized the concept of "no-fault" divorce thousands of years ago. Judaism has always accepted divorce as a fact of life, albeit an unfortunate one. Judaism generally maintains that it is better for a couple to divorce than to remain together in a State of constant bitterness and strife.

Under Jewish law, only men can initiate divorce. They can divorce their wives for little or no reason although provision in the "*ketubah*," marriage contract, do protect certain rights. The divorce in the Jewish religious tradition is obtained in the Bet Din, the rabbinical court, by obtaining a *get*. The *get* is the religious form of divorce recognized by Judaic law allowing for religious approval of availability for remarriage.

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<sup>885</sup> BROYDE, M., *Marriage, Divorce and the Abandoned Wife in Jewish Law: a Conceptual Understanding of the Agunah Problems in America*, New York: KTAV Publishing House, 2001, pp. 43-58.

<sup>886</sup> In Jewish Law a *get* (גט, plural gittim or gittin גיטין) is a divorce document, which is presented by a husband to his wife to effect their divorce. The essential text of the *get* is quite short: "You are hereby permitted to all men," i.e., the wife is no longer a married woman, and the laws of adultery no longer apply. A *Get* is actually a writ of divorce. A *Get* is required when a Jewish couple wishes to religiously dissolve their marriage. A *Get* is not required when only one spouse is Jewish. The Husband asks a trained scribe to write the *Get*. The Husband gives the Wife the *Get* in the presence of a rabbinical tribunal (Beth Din) of three individuals and two witnesses. The Wife's acceptance of the *Get* makes the divorce final. It is not an adversary procedure.

<sup>887</sup> NEUFELD, E., *Ancient Hebrew Marriage Laws with special references to General Semitic Laws and Customs*, London: Longmans, Green and Co., 1944, p. 266.

<sup>888</sup> *Mamzer* (Hebrew: ממזר) is a person born of certain forbidden relationships between two Jews. That is, one who is born from a married woman as a product of adultery or someone born as a product of incest between certain close relatives.

<sup>889</sup> MEISELMAN, M., *Woman in Jewish Law*, New York: KTAV Publishing House, 1978, p. 190.

Jewish women must obtain a "get," a bill of divorce, from their husbands. If they remarry without one, they are considered to be adulterous and children from the marriage are considered illegitimate and barred from some Jewish marriages. Although the process is relatively simple, many Jewish women find themselves "*agunah*" (literally, anchored) in a Jewish marriage if their husbands refuse to issue a get or if husbands have deserted them and cannot be found<sup>890</sup>.

A man can divorce a woman for any reason or no reason. The Talmud<sup>891</sup> specifically says that a man can divorce a woman because she spoiled his dinner or simply because he finds another woman more attractive, and the woman's consent to the divorce is not required. In fact, Jewish law requires divorce in some circumstances: when the wife commits a sexual transgression, a man must divorce her, even if he is inclined to forgive her.

The procedural details involved in arranging a divorce are complex and exacting. Except in certain cases of misconduct by the wife, a man who divorces his wife is required to pay her substantial sums of money, as specified in the *ketubah*<sup>892</sup>. In addition, Jewish law prohibits a man from remarrying his ex-wife after she has married another man. *Kohanim*<sup>893</sup> cannot marry divorcees at all.

According to the Torah<sup>894</sup>, divorce is accomplished simply by writing a bill of divorce, handing it to the wife, and sending her away. To prevent husbands from divorcing their wives recklessly or without proper consideration, the rabbis<sup>895</sup> created complex rules regarding the process of writing the document, of its delivery and acceptance. A competent rabbinical authority should be consulted for any divorce<sup>896</sup>.

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<sup>890</sup> MIELZINER, B., *The Jewish Law of Marriage and Divorce in Ancient and Modern Times*, Cincinnati: Bloch Publishing and Printing Co., 1884. (Reprinted Fred B. Rothman & Co. Littleton Colorado, 1987), pp. 45-54.

<sup>891</sup> The most significant collection of the Jewish oral tradition interpreting the Torah.

<sup>892</sup> The Jewish marriage contract.

<sup>893</sup> Kohanim is a Jew who is in direct patrilineal descent from the Biblical Aaron. The name Kohen is used in the Torah to refer to priests, both Jewish and non-Jewish, as well as the Jewish nation as a whole. During the existence of the Temple in Jerusalem, Kohanim performed specific duties vis-à-vis the daily and festival sacrificial offerings.

<sup>894</sup> Torah the first five books of the Bible: Genesis, Exodus, Leviticus, Numbers and Deuteronomy, sometimes called the Pentateuch. In its broadest sense, Torah is the entire body of Jewish teachings.

<sup>895</sup> A religious teacher and person authorized to make decisions on issues of Jewish law. Also performs many of the same functions as a Protestant minister. When I speak generally of things that were said or decided by "the rabbis," I am speaking of matters that have been generally agreed upon by authoritative Jewish scholars over the centuries.

<sup>896</sup> BROYDE, *supra* note 889, p. 17.

It is important to note that a civil divorce is not sufficient to dissolve a Jewish marriage. As far as Jewish law<sup>897</sup> is concerned, a couple remains married until the woman receives the get. This has been a significant problem: many liberal Jews have a religiously valid marriage, yet do not obtain a religiously valid divorce.

In the Jewish religious tradition, there is a civil<sup>898</sup> divorce procedure provided by the government and a parallel religious divorce procedure referred to as a “get”. In order to obtain the civil divorce, the divorce laws of the regular secular courts are utilized. A crossover between the religious system and the civil system exists in case law that recognizes that a spouse refusing to give the wife a get can be ordered to do so by the civil court in some jurisdictions<sup>899</sup>.

*b) Position of European countries as to the possible recognition in Europe of a Torah divorce*

Jewish *ghet* pronounced in a country of the European Union will not be directly and automatically enforced, even if pronounced in front of the consular authority of a State that permits these forms of dissolution. However, this position is weakened regarding the recognition of foreign decisions: forms of “consensual repudiation,” pronounced by the husband at the request of his wife or with her acceptance (on a par with consensual divorce), and divorces where a woman is given fair financial compensation are enforced, even though they are not judiciary acts<sup>900</sup>.

However, in that case, the system is prejudiced against the weaker party because the woman has to renounce the *get* in order to obtain divorce. States impose different conditions in order to ensure that the torah divorce occurs abroad: some stricter jurisdictions require that all the phases of the procedure must take place abroad; other jurisdictions are more flexible<sup>901</sup>.

Jewish religious divorces granted by religious authorities were not purporting to be valid in European Union countries. For example, under English law to dissolve a marriage, injustices were occurring in England with the refusal of one spouse, invariably

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<sup>897</sup> *The Law of Israel: General Surveys*, Jerusalem: Zamir & Colombo, 1995, p. 45.

<sup>898</sup> RABELLO, A., *European Legal Traditions and Israel*, Jerusalem: Hebrew University of Jerusalem, 1994, p. 75.

<sup>899</sup> MIELZINER, *supra* note 894, pp. 48-53.

<sup>900</sup> FERRARI, S. and IBÁN, I., *Diritto e Religione in Europa Occidentale*, Bologna: Il Mulino, 1997, pp. 87-88.

<sup>901</sup> CAMPIGLIO, C., *Matrimonio Poligamico e Ripudio nell'Esperienza Giuridica dell'Occidente Europeo*, Padova: Pubbl. trim., 2008, pp. 853-908.

the husband, to grant a religious divorce. This arose where, by the religion, he alone could apply for the religious divorce. This could leave the wife divorced by civil law yet still married by her religion. It was particularly a problem within the Jewish community where some Jewish husbands prevented their (civil divorced) wives from remarrying according to their faith by refusing to grant them a get, a Jewish divorce. In *Berkovits v Grinberg* [1995] 1 FLR 477<sup>902</sup>, a Jewish Get written in London under Jewish ecclesiastical law and delivered to the wife at the Rabbinical Court in Israel, was effective as an Israeli divorce but was not entitled to recognition in England. Proceedings must be a single set of proceedings. “*Proceedings must begin and end in the same place. A transnational divorce could not be recognized*”: Wall J. This was remedied by the Divorce (Religious Marriages) Act 2002, repealing section 9 (3) and (4) Family Law Act 1996 and creating new s10A MCA 1973. It applies if there is a decree nisi and not a decree absolute of divorce and one party married according to certain stipulated religious usages. An English court can order a decree absolute not to be granted until there is a declaration that both parties have taken all steps to dissolve the religious marriage. The order will only be made if it is just and reasonable to do so. It can be revoked at any time<sup>903</sup>.

*c) What is the situation in Lithuania?*

Jewish marriages conducted in synagogues in the Lithuania are registered with the State if the conditions laid down in Articles 3.12 to 3.17 of Lithuanian Civil Code hereof have been satisfied. Synagogues employ a civil Registrar of Marriages to ensure that a marriage in a synagogue is also registered as a civil marriage. However, religious and civil divorces are separate procedures. A Jewish divorce is not an alternative to a civil divorce. It does not alter an individual's legal status, just as a civil divorce does not dissolve a religious marriage.

Dissolution of marriage shall be governed by the law of the spouses' State of domicile, or in the case the latter is not indicated by the law of the state of their last common domicile, or failing that, by the law of the state where the case is tried. If the law of the state of common citizenship of the spouses does not permit a dissolution of marriage or imposes special conditions for dissolution, the dissolution of marriage may be performed in accordance with the law of the Republic of Lithuania if one of the spouses is also a Lithuanian citizen or is domiciled in the Republic of Lithuania. The courts of the

<sup>902</sup> English case. *Berkovits v Grinberg* [1995] 1 FLR 477.

<sup>903</sup> HODSON, *supra* note 849.

Republic of Lithuania shall have jurisdiction over actions of annulment, dissolution of marriage or separation in the cases provided for by the code of civil procedure of the Republic of Lithuania.

Religious divorces granted by religious authorities were not purporting to be valid according to Lithuanian law to dissolve a marriage, injustices were occurring in Lithuania with the refusal of one spouse, invariably the husband, to grant a religious divorce. This arose where, by the religion, he alone could apply for the religious divorce. This could leave the wife divorced by civil law yet still married by her religion. It was particularly a problem within the Jewish community where some Jewish husbands prevented their (civil divorced) wives from remarrying according to their faith by refusing to grant them a get, a Jewish divorce.

Just as Lithuanian public policy may change, so international family law practice changes, and has especially changed dramatically over the past few years. The public policy, perhaps even political dimensional, is as present now as in the past. There is a much greater awareness of international judicial comity and cooperation. Moreover, there is strong encouragement for judges in different countries to liaise together regarding a particular case.

## GENERAL CONCLUSIONS

The analysis representing different scientific and legal sources showed that both religious communities and State have strong interests in regulating marriage. It arises from the fundamental institutional, practical and conceptual identities and needs of the State, as well as of the Church.

Not only the conflicts between the Church and the State over the marriage regulation, or between autonomy of religious community and individual religious liberty, but also the civil marriage regulation and protection of public interests significantly threaten both of those institutions.

The law takes a different approach to the marriage and family institution in comparison to the Church. The State does not recognize the indissolubility of marriage and undeniable preservation of the same qualities of marriage; it does not require spouses to keep to the engagements with the same strictness as the Church implies.

The State and religion in a liberal State acknowledge each other's sovereignty in their field, and they co-operate. A problem emerges due to the fields in which the institutions realize their sovereignty. Both institutions care for the welfare of people. However, the State cares only in a secular field, which embodies the welfare of individuals by creating opportunities for people to satisfy their interests. At the same time, the care of individual interests does not violate the welfare and rights of others. So, the State provides guarantees and limits the rights of its citizens, while the Church maintains considering marriage as a sacrament and pushes its legal contents into the second place. This attitude is reasonable in the view of separation of powers between the State and the Church: the consequences of the sacramental marriage are to be legitimised by the State regulations; it is only the State that determines legally binding rights and obligations.

Thus, in seeking to respond to the main research question, namely - *whether Lithuanian civil laws assure recognition of the church marriage, which is guaranteed by the Constitution* - it has to be concluded that according to the current order in Lithuania, a marriage registered only by the Church does not cause lawful consequences (i.e. duties or rights under civil law).

This situation is confirmed in the decisions taken by Lithuanian courts, such as for example, the Supreme Court of Lithuania (civil case No. 3 K-3 – 107/2005); in civil case No. 3K-7-563/2005) it stated that the recognition of the church marriage is not absolute

and the Civil Code of the Republic of Lithuania imposes some conditions for the recognition of the church marriage. Only after fulfilling those, conditions, the church marriage has the same legal consequences as a civil marriage. We have discussed this situation laid down in the Constitution and our analysis has disclosed the legislative gaps and the problems with the church marriage. It also laid bare certain incompatibilities with the civil marriage as well as problems of their mutual recognition.

In this thesis, it has been argued that *Lithuania's approach to the recognition and registration of the church marriage is formulated neither clearly nor comprehensively.*

The analysis of the developments towards legal recognition of the church marriage revealed that both the Church and the State in Lithuania recognize that the spouses' agreement for marriage is sufficient to validate marriage. But for a marriage to receive validity in the field of civil law or the public area the marital agreement must be registered in public institutions. Marriages arranged by the Church obtain civil consequences only after being registered at the civil registry. However, upon registration marriages are recognized as valid from the moment of the church agreement was concluded, legitimating children and recognizing other juridical consequences that flow from the marriage agreement.

Juridical conflicts also rise because of the marriage documentation system of the Church. Conflicts arise by missing the ten-day marriage registration period during which a church marriage must be registered in a Civil Registry; the date written in the marriage certificates is coincident with the date when representatives of the church apply for the registration of marriage. Church marriages not registered within ten days are considered invalid by the Civil law. In this case, I have indicated that I find this is a violation of a Constitutional postulate and as a legislative gap.

The documentation of religious marriages in Lithuania also gives rise to legal sanctions. In a case where the church has failed to register a church marriage with the Civil Registry office within the prescribed ten-day period, the later date when a representative of the church or a spouse finally does apply for the registration of the marriage, is written into the civil marriage certificate. In such a situation the religious marriage, is considered ineffective in civil law for the period of time up until the date of registration. Generally speaking, the Lithuanian Civil Law does not state an imperative obligation for the marriage concluded under the Catholic Canon law to be recorded in the Civil Registry. The spouses

have only the right to conclude a church marriage, but they have no duty to register it in the Civil Registry, they are not accountable for that.

Spouses who have not registered face problems related to their personal and/or property relations. For example, property acquired by both spouses will not be recognized as a joint property, unless the couple registers their marriage in the Civil Registry. Also the spouses will not have a legal ground to take a surname of the other spouse. Such sanctions or negative consequences will be suffered by the spouses in particular, whereas no liability is foreseen for the representatives of the church for not informing the Civil Registry authorities about the conclusion of the church marriage. In any case, we have argued in this thesis that marriages recognized by the Church should have the same legal consequences as the civil marriages, as it is foreseen in Article 38 of the Lithuanian Republic Constitution.

It may be observed, that the Civil code forms an obstruction to the recognition of the religious marriage (guaranteed by the Constitution). This too, we have described in this thesis as an infringement of the law and as another legislative gap.

Traditionally it is accepted in comparative private international law that the formal validity of marriage is subject to *lex loci actus* (*lex loci celebrationis*). This means, that as a result, marriage is valid as to form if it is valid according to the law of the State where it is celebrated. Such a conflicts-of law solution is accepted in Art. 3.24 of the Lithuanian Civil Code. The important factor is whether the country where marriage is celebrated recognizes or does not recognize the religious form of marriage. Therefore, if the marriage is validly contracted in a foreign country in religious form, as a consequence such marriage could simply be recognized as valid in Lithuania. But again, as with domestic religious marriages in order to produce civil effects in Lithuania, it should be entered into the registers of civil registry *in that country of its conclusion or "origin"* (these issues were announced above in part IV, chapter I, sub chapter IV, p. 183). If, on the contrary, in the foreign country the civil form of marriage is obligatory, then a marriage celebrated in religious form can't be recognized as valid according to Lithuanian law, in application of the rule just stated.

Problems also appear on the annulment of a church marriage. The Church recognizes marriage as everlasting and it rarely discharges valid marriage, except in the very extraordinary cases of marriages "*ratum non consumatum*" and where the



„*privilegium Paulinum*“ is in play. However, due to strict Church requirements for valid marriage, the ecclesiastical court sometimes recognizes a marriage as invalid, whilst in the meantime such a marriage may have obtained the civil recognition through its registration. Indeed, a marriage viewed by the Church as invalid is not automatically considered as invalid by the civil law. The current legislation of the Lithuanian Republic does not foresee or solve such difficult cases.

The fact of an intervening civil divorce does not annul a canonical marriage, which remains valid until its recognition would exceptionally be invalidated by the canonical Tribunal (Lithuanian Supreme Court decision in a Civil case No. 3 K-3 – 462/2000, cited above in note No. 743).

Taking these diverse considerations into account, the main research question is thus answered more fully. The State only approves of marriages registered by its own institutions; hence, church marriages unregistered in the State institutions remain without recognition.

So finally, the question arose what can be done in order to assure the in my view correct recognition of the Church marriage which is guaranteed by the Lithuanian Constitution?

I have contend in the above thesis, this problem should be solved on a legislative level. My proposal is firstly, to change the civil registration order of the church marriage, because the current provisions of the Lithuanian Civil Code contradict Article 38 (4) of the LR Constitution. Changes in Lithuanian legal regulations on these issues can be made using the experience of domestic law of other European Union countries. For example, the period of the church marriage registration in the Civil Registry should be shorter, such as in Italy (24 hours), Poland (5 days), Spain or Portugal. These changes will help spouses to avoid some legal problems related with their personal and property obligations.

Secondly, I propose, that just as in Latvia and in other European Union countries, the law should impose liability of the representatives of the Church for not informing the civil authorities about the conclusion of the church marriage.

Furthermore, main parts of the analysis are devoted to the aspects of private international law. The analysis is focused on the importance of legal cooperation in the international field. Lithuania is confronted with great mobility of couples and their families. Moreover, marriage certificates, divorce decisions follow them and are regularly

presented in other countries in comparison to the country of origin. We are particularly confronted with religious marriage from abroad and with unilateral divorces. Because of Lithuania being a part of the European Union and bound to treaty obligations with several foreign partner-countries, the review of international legal aspects must be done.

In deciding whether a foreign marriage should be recognized as valid according to the rules of the Private International law of a country, the courts must consider a range of legal, cultural, moral, religious and social values that are held in high importance both for the country in which recognition is sought and for the country in which the marriage was celebrated. Most countries distinguish between marriage formalities and marriage essentials for purposes of marriage recognition. The predominant recognition rule regarding marriage formalities if it was concluded abroad is to simply apply the law of the place where the marriage was celebrated. Regarding marriage essentials there are two dominant choice-of-law systems widely used for international marriage recognition. One is the rule checking the compatibility with the personal law. The other is again to apply the rule of *lex loci celebrationis* and then to check in case of recognition whether the parties abided by the substantial requirements of the foreign local law.

The position taken by the *lex loci celebrationis* or by the personal law of the other party, if different, is immaterial. This system does not prevail in all countries in whose domestic law a religious solemnisation is compulsory, some of those countries being prepared to recognise marriages of their citizens which comply as to form with the *lex loci celebrationis* (English cases where foreign elements have been present but seem to have been ignored by the courts).

Some countries whose domestic law provides for a religious form, or different religious forms, of marriage allow their nationals marrying abroad to use such forms as an alternative to the local form prevailing in the country of celebration. For example, the domestic law of Italy and Portugal contains provisions, going back to the concordats concluded with Holy See in 1984 and 2004 respectively, on recognition of “Catholic marriages”, that is to say, marriages celebrated before ministers of the Catholic Church. Such marriages are subject to a special regime, differing from that applicable to civil marriages, as regards the conditions and formalities of their creation as well as their dissolution. As concerns the extraterritorial application of these provisions, however, the position is different in the two countries.

Regarding canonical annulments granted by ecclesiastical courts, some Member States have by legislation submitted such decisions for recognition to their civil courts. Sometimes this is based on a concordat or convention with the Holy See (such as in Italy, Portugal, Spain, ~~and Malta~~). Canonical annulments could come into conflict with the domestic laws of other Member States because these countries do not recognize the canonical grounds for annulment, or because of procedural reasons.

The most important findings discussed in this thesis are, that specific annulments originating in a foreign country come into procedural or substantive conflict with domestic public policy or with the European Convention on the Protection of Human Rights and Fundamental Freedoms. The State where court proceedings have been instituted must refuse exequatur or recognition of the ecclesiastical decision. The petitioner should then be able to institute standard civil annulment, separation or divorce proceedings. Otherwise, the only remedy available would be to appeal to the European Court of Human Rights in Strasbourg, which would unduly prolong procedures. Although the number of cases of negative conflicts of jurisdiction may be relatively low, the European Commission considers that a Community initiative is justified if such instances would result in the violation of a fundamental right, i.e. the right of access to a court with jurisdiction to grant and settle divorce, legal separation or annulment.

It can be stated, when summarizing the material law of Member States of the European Union, that the material basis for divorces differs extremely. Each Member State has its own rules. The role of the EU is mainly concerned with ensuring that decisions made in one country can be recognized in another. It also has a role in trying to establish which country has jurisdiction to hear a particular case and then also, for those countries bound in the enhanced cooperation, to determine the applicable law for the dissolution by divorce. Even applying the Regulation, which unifies jurisdiction rules, situations might come up when that court shall apply its own national matrimonial law (*lex fori*) which may be extremely different from the law as it stands in the country of the spouses' domicile.

Therefore situations may occur when one spouse starts divorce proceedings in the court of a Member State that applies *lex fori* for divorce matters. If *lex fori* drastically differs from the law of the habitual residence of another spouse, this could violate the legal expectations and legal certainty of that spouse. Therefore jurisdiction rules in the EU Regulation No. 1259/2010 should be amended by incorporating case transferral

mechanism, or the doctrine of *forum non conveniens*. In this scenario, in an exceptional case, the court addressing the case could have the possibility to transfer the case to another member state with which parties have stronger connections or decline jurisdiction if it is clearly inappropriate to both parties. The EU Regulation No. 1259/2010 is applied in fifteen member states: in Austria, in Bulgaria, in Belgium, in Latvia, in France, in Germany, in Italy, in Spain, in Slovenia, in Malta, in Romania, in Hungary, in Portugal, in Luxembourg and from 22 May 2014 in Lithuania.

I described, in the thesis above, the rules of recognition of divorce where the EU has introduced its Regulation for that field and I described how countries approach recognition of divorce in the margin thereof.

In order to disclose interactions between religious and civil law systems in marriage, its dissolution and recognition or non-recognition in European Member States, in this thesis I have analysed possibilities and legal consequences of religious divorce under Catholic canon law, Islamic and Jewish religious law occurring beyond Europe's border and their civil recognition. It can be stated that there is no religion that encourages divorce, but whereas Roman Catholicism continues to forbid divorce, Jewish and Islam rules permit it. I have also discussed how the European member States have taken position when the recognition is requested of a repudiation done in a Muslim country (i.e. outside the EU). National principles of recognition apply to those non-EU divorces. Marriage in Islam is a sanctified bond that should not be broken except for compelling reasons but the husband does have the privilege of declaring termination unilaterally. Islamic countries however recognize the right of both partners to end their matrimonial relationship before a court of law. I have offered conclusions with regard to recognition of polygamy and repudiation which might be helpful for Lithuania. In conclusion, polygamy remains the open issue, which, despite the rapid developments occurring in European countries' family law, are likely to find no permanent and shared solutions in the near future. Unilateral repudiation is always rejected when the spouses reside in the EU.

Jewish religious divorces granted by religious authorities will not be recognized as valid in the European Union countries and no legal consequences for spouses will arise there. For example, dissolving marriage under English law is particularly problematic within the Jewish community. Some Jewish husbands prevent their (civil divorced) wives from remarriage according to their faith by refusing to grant them a Jewish religious

divorce. A Jewish religious divorce is also not an alternative to a civil divorce under Lithuania civil law. It does not alter an individual's legal status, just as a civil divorce does not dissolve a religious marriage.

After the analysis of different scientific and legal sources it can be concluded that in several EU countries interactions between religious and civil law systems in marriage and its dissolution, show the civil law as dominant. The civil laws in Lithuania especially and also in other European jurisdictions do acknowledge the existence of a parallel system of religious law regarding divorce that is valid for the religious authorities. We have described how the civil legal system determines the conditions under which marriage and its annulment or religious divorce may be carried through with civil legal consequences, in the national scene in Lithuania, as well as for the international scene when marriages were concluded or divorces were obtained abroad. I have pointed out remaining uncertainties and frictions and have indicated that this causes sentiments of injustice for those who follow religious rules.

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Lauko kodas pakeistas

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## **APPENDICES**

## *Appendix N. 1*

Form approved by the Minister of Justice of the  
Republic of Lithuania by the order of February  
28<sup>th</sup>, 2005, no. 1R-68

Certificate issued \_\_\_\_\_ registry no. \_\_\_\_\_ No. \_\_\_\_\_

His \_\_\_\_\_  
(First name, last name)

\_\_\_\_\_  
(Place of residence)

Her \_\_\_\_\_  
(First name, last name)

\_\_\_\_\_  
(Place of residence)

*To the Kaunas city civil registry office*

### **APPLICATION FOR RECORDING A MARRIAGE**

\_\_\_\_\_  
(date YYYY/MM/DD)

The marriage was concluded on \_\_\_\_\_ (date YYYY/MM/DD) at  
\_\_\_\_\_.

We hereby apply for recording of our marriage. We hereby present the following  
information:

	He	She
<b>Personal number</b>		
<b>Place of birth</b>		
<b>Nationality*</b>		
<b>Citizenship</b>		
<b>Marital status (unmarried, widower, widow, divorced)</b>		
<b>Have you ever registered a religious marriage with any other person?</b>		
<b>Which marriage is it?</b>		

<b>Document of personal identification</b>		
<b>Last name after the marriage</b>		

We were supplied with information on the procedure and conditions of registering a marriage. We have informed each other about the personal health state. We were made fully aware of spousal and parental rights and responsibilities. We were warned about criminal liability for presentation of false information.

\_\_\_\_\_  
(Signature, first name, last name)

\_\_\_\_\_  
(Signature, first name, last name)

The marriage was recorded on:

\_\_\_\_\_  
(date YYYY/MM/DD)

**\*It is allowed to leave this field blank.**

## Appendix N. 2

Received \_\_\_\_\_

\_\_\_\_\_  
(name, surname)

\_\_\_\_\_  
(place of residence and telephone)

\_\_\_\_\_  
(name, surname)

\_\_\_\_\_  
(place of residence and telephone)

**To: Kaunas Municipality**  
Civil Registry Office

### APPLICATION TO RECORD MARRIAGE REGISTERED IN A FOREIGN STATE

\_\_\_\_\_ 2012

We were marriage on \_\_\_\_\_ 20 \_\_\_\_\_

We request to record our marriage. We provide the following data about ourselves:

	He	She
Personal number	3 <input type="text"/>	4 <input type="text"/>
Place of birth	<input type="text"/>	<input type="text"/>
Nationality (not obligatory)	<input type="text"/>	<input type="text"/>
Citizenship	<input type="text"/>	<input type="text"/>
Marital status (single, widow(-er), divorced)	<input type="text"/>	<input type="text"/>
Have you registered any marriage with another person in church?	<input type="text"/>	<input type="text"/>
Which marriage is it?	<input type="text"/>	<input type="text"/>
Identification document (passport or personal identification card: series, No. who issued and when)	<input type="text"/>	<input type="text"/>
Surname after marriage	<input type="text"/>	<input type="text"/>

We are familiar with the terms and conditions of conclusion of marriage and procedure of registration. We have informed each other about our health. We were explained the rights and duties of spouses and parents. We were warned about criminal liability for provision of false data.

\_\_\_\_\_  
(signature, name, surname)

\_\_\_\_\_  
(signature, name, surname)

**Marriage recorded in Kaunas Municipality CRO**  
\_\_\_\_\_ 2012  
record No. \_\_\_\_\_ / AA No. \_\_\_\_\_

### Appendix N. 3



Map showing changes in the territory of Lithuania from the 13th century to the present day.

Source: Lithuania proper: [http://en.wikipedia.org/wiki/Lithuania\\_proper](http://en.wikipedia.org/wiki/Lithuania_proper) (last visited October 25, 2013).

#### ***Appendix N. 4***

##### **Lithuanian agreements and conventions on legal assistance and legal relations in civil and family cases**

###### **A. Agreements**

- 1992 11 11 Trilateral agreement between the Republic of Lithuania, the Republic of Latvia and the Republic of Estonia on legal aid and legal relations;
- 1993 10 18 Agreement between the Republic of Lithuania and the Russian Federation on legal assistance and legal relations in civil, family and criminal cases;
- 1993 10 18 Bilateral agreement between the Republic of Lithuania and the Republic of Poland on legal assistance and legal relations in civil, family, labour and criminal cases.
- 1993 10 18 Agreement between the Republic of Lithuania and the Republic of Moldova on legal assistance and legal relations in civil, family and criminal cases.
- 1993 10 18 Agreement between the Republic of Lithuania and the Republic of Uzbekistan on legal assistance and legal relations in civil, family and criminal cases.
- 1994 07 11 Agreement between the Republic of Lithuania and the Republic of Belarus on legal assistance and legal relations in civil, family and criminal cases;
- 2002 01 29 Treaty between the Republic of Lithuania and China on legal assistance and legal relations in civil, family and criminal cases;
- 1994 07 11 Treaty between the Republic of Lithuania and Ukraine on legal assistance and legal relations in civil, family and criminal cases
- 2005 07 08 Treaty between the Republic of Lithuania and Armenia on legal assistance and legal relations in civil, family and criminal cases;
- 1995 09 19 Agreement on Legal and Judicial Cooperation in Commercial and Civil Matters between the Republic of Lithuania and the Republic of Turkey.
- 1999 04 08 Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Kazakhstan on legal assistance and legal relations in civil, family and criminal cases.
- 2002 11 22 Agreement between the Republic of Lithuania and the Republic of Azerbaijan on legal assistance and legal relations in civil, family and criminal cases.

**B. Lithuania is also party to the following multilateral conventions:**

- 1965 11 15 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
- 1968 06 07 European Convention on Information on Foreign Law.
- 1969 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
- 1972 10 07 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, but is in force only with those countries which agreed to the accession of Lithuania.
- 1988 07 28 Convention on International Access to Justice.

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